The Central Law Journal.

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CURRENT TOPICS.

Two important oral opinions in bankruptcy were recently delivered by Hon. Samuel Treat, of the United States District Court, for the Eastern District of Missouri. In the first case, *In re* Comstock *et al.*, it was held that in composition cases secured creditors have no voice, unless they surrender their securities and appear as creditors at large. After the recording of the resolution for composition, a secured creditor can not be permitted to delay composition proceedings by subjecting collaterals to sale, and prove up for the balance as if unsecured. They must in due time accept one position or the other. In the second case, *In re* Central Savings Bank, Hugh Boyle & Company filed their petition for an order restraining the assignee of the bank from paying the dividend due on a claim held by one Frederick Brocksieck, a creditor of the bank, and subjecting such dividend to the satisfaction of a judgment, obtained by said Boyle & Company against said Brocksieck. Upon hearing, the court held that the relief sought was without the jurisdiction of a court of bankruptcy, and dismissed the petition accordingly.

IT SEEMS to have been an undisturbed rule in England that when a witness, acquainted with the reputation of another for truth and veracity, testifies that such reputation is bad, he may be allowed to further testify that from such reputation he would not believe him under oath. And such, without exception, has been the ruling of the courts in this country. But Mr. Greenleaf, in his work on Evidence (vol. 1, sec. 461), states that the weight of authority is against the admission of such evidence. In the recent case of Hillis v. Wylie, 26 Ohio St. 574, the point is considered, the court arriving at the conclusion that the rule in England, as appears from the text-books, as well as from the late case of Reg. v. Brown, 1 L. R. C. C. 70, is clearly in favor of admitting such evidence. In this country, it is said, this rule has been expressly declared to be sound in thirteen states, to-wit: New York—People v. Mather, 4 Wend. 229; People v. Davis, 21 Wend. 309. New Hampshire—Titus v. Ashe, 4 Foster, 319. Pennsylvania — Boyle v. Kreitzer, 46 Penn. St. 488; Lyman v. Phila. 56 Penn. St. 488. Maryland—Knight v. House, 29 Md. 194. California—Stevans v. Irwin, 12 Cal. 306; People v. Tyler, 35 Cal. 553. Illinois—Eason v. Chapman, 21 Ill. 33. Wisconsin—Wilson v. State, 3 Wis. 798. Georgia—Stokes v. State, 18 Ga. 17. Tennessee—Ford v. Ford, 7 Humph. 92. Alabama—McCutchen v. McCutchen, 9 Port. 650. South Carolina—Anonymous, 1 Hill, 258. Kentucky—Mobley v. Hamit, A. K. Marsh. 590. Michigan—Hamilton v. People, 29 Mich. 173; Gilbert v. Kennedy, 22 Mich. 118. Also, United States v. Van Sickle, 2 McLean, 219. In Hamilton v. People, *supra*, the court say: "Until Mr. Greenleaf allowed a statement to creep into his work on Evidence to the effect that the American authorities disfavored the English rule, it was never very seriously questioned. It is a little remarkable that of the cases referred to, to sustain this idea, not one contained a decision upon the question, and only one contained more than a passing *dictum*, not in any way called for—Phillips v. Kingfield, 1 Appleton (Me.), 375. The authorities referred to in that case contained no such decision, and the court, after reasoning out the matter somewhat carefully, declared, the question was not presented by the record for decision. The American editors of Starkie and Phillips do not appear to have discovered any such conflict, and do not allude to it."

A SAINT LOUIS daily journal contained on Sunday last an editorial entitled "Paying the Lawyers," which was written in a spirit so disingenuous and reckless, that it deserves some attention. For fear we shall do injustice to it, we reprint it entire elsewhere; but we propose to examine some parts of it here. A daily newspaper is run on precisely the same plan as a theatre; its success lies in exciting the people without disgusting them. This is accomplished in various ways, among which are, abusing and getting up a howl against a particular class of men. The journal alluded to asserts that "in cases where the fees are fixed by order of a court, in cases where estates and minor heirs are victimized, and especially in cases where a city, county, state or other public corporation is plaintiff or defendant, it has grown to be the custom for the lawyer to estimate his fee, not according to the work required, nor according to the service rendered, but rather according to the rule of the three-card-monte man, who always leaves his victim enough to get his supper with." This sweeping assertion, against the entire body of the legal profession, is so shockingly untruthful as scarcely to deserve notice. But in certain instances it is no doubt true. There are liars, thieves, blackmailers, and conspirators in every profession—in law as well as in journalism; and wherever a public journal arraigns such persons before the bar of public opinion, it deserves the public thanks. If the case to which the journal in question refers, "of an estate in New York valued at over a hundred thousand dollars, which was wholly swallowed up by the fees of legal sharks who obtained a warrant

of the court to prey on it," be true, it is an infamy before which the infamy of those public journals which blackmailed the whiskey ring and shared the moneys it had stolen from the government, sinks into insignificance; and even a journal which has had its conscience purged by the ordeal of a successful government prosecution for participating in the spoils of that famous conspiracy, may be entitled to thanks for denouncing so great a wrong.

If this case of the New York estate, however, is not more truthfully stated than the next instance put by the article in question, "the famous case in this county in which a young attorney obtained a contract for some fifty thousand dollars for something less than a month's work," it will not serve to point a moral, much less to ground a bill of indictment before the tribunal of public opinion. As the case referred to may not be familiar to our readers, we will state that it is the case of the intervening bill of Saint Louis County in the suit of Ketchum v. The Pacific Railroad, in which Mr. Frank J. Bowman, of the firm of Hill and Bowman, after a struggle in the United States Circuit Court extending over the period of a year, procured a decree declaring the claim of the county for bonds issued in aid of the railroad to be a lien upon its earnings until the principal sum should be paid. This decree was rendered on a demurrer. Afterwards an answer was filed raising new defences, and the taking of proof under this answer is about to commence before a master in chancery. Whichever way the issues are determined in the court here, the case will undoubtedly go to the Supreme Court of the United States. Mr. Bowman's contract with the County Court simply is, to pay his associate counsel out of his own pocket, in effect to support the litigation out of his private funds until its final termination, and then, *in case he succeeds*, to get seven per cent. of the amount recovered, and in case he fails, to get nothing. We do not believe he can carry the litigation through to its termination at an outlay of less than twenty thousand dollars. If he succeeds, he will have earned some thirty thousand dollars beyond this sum; if he fails, he will have lost twenty thousand, besides his time and labor. The very head and front of his offending hath this extent—no more. It is true that he is much to blame for being "a young attorney;" and, if he has exhibited a grasping disposition in this case, it is much to be hoped that he belongs to that class of men whose greed does not increase with advancing years. At all events, notwithstanding the infirmities which the newspaper in question imputes to him—youth and avarice—he has thus far succeeded in keeping out of jail. The only matter which seems fairly open to comment is the propriety of taking a contingent fee, even in a case where the public interests are involved. We think an unconditional fee ought to have been agreed upon.

The writer of the article in question resorts to a comparison to which we would not allude, but for the fact that some consideration is due even to a fool, when he secures the privilege of writing in a widely circulated public journal. He says: "If the engineer should demand a fee of $50,000 for building a $700,000 bridge, he would be laughed at; if a doctor should demand a percentage of a millionaire's wealth for saving his life, he would be hooted out of the profession." To show the absurdity of this comparison, let us suppose that the engineer in question paid all his assistants, and all the laborers on the bridge out of his own pocket; or suppose that the doctor paid all the expenses of the patient's sickness, including consulting physicians, nurses and medicines, under a contract that he should get nothing if the patient died. A man who lends his money on the bottom of a ship, and thereby stakes it on the chances of wind and wave, is allowed to charge interest which would otherwise be usurious. So a man who stakes his time and money on the uncertain event of a lawsuit, because the agents of the public will contract on no other basis, is certainly entitled to a greater remuneration in case of success than he would ordinarily receive.

The article in question arraigns three members of the St. Louis bar for taking a retainer of a thousand dollars each, in what the writer is pleased to term "a case which will not interfere with their ordinary practice." We do not know what the "ordinary practice" of these three lawyers is; perhaps the newspaper in question does. But we do know that their ordinary practice must be humble indeed, if it is not interfered with by this suit. It is one of those contested election cases—the question being whether the scheme for the separation of Saint Louis City from Saint Louis County was or was not adopted by the people at the recent election at which the question was voted on. It is a case which will undoubtedly involve the investigation of a great variety of difficult questions, and will require the most severe and protracted exertions on the part of counsel on both sides. We certainly think that fair-minded men will agree that in such a case a retainer of a thousand dollars, to a lawyer of any standing at all, is a very small retainer—especially in view of the fact that it may be all he will get.

The article in question ends by saying that "at a time when every relief from taxation is so eagerly sought, we have a right to demand that those inexcusable extortions shall cease, and that the judges who have sanctioned them, the officials who have awarded them, and the distinguished lawyers who have pocketed them, shall be brought up very sharply before the bar of public opinion, and straightway restrained within the limits of reason." Well, the whole upshot of it is that lawyers are very bad men. To quote from the article in question, "there is no other profession in the world in which such absurd and preposterous demands prevail." But knavish as lawyers are, they have invented some very wise and

just maxims with reference to the administration of justice. One of these maxims is that he who seeks the aid of a court of justice must come with clean hands. Would it not be fair to extend this maxim so as to embrace the case of a newspaper which assumes to arraign one of the learned professions before the august tribunal of public opinion? Would it not be just to say: "Mr. Editor, or Mr. Publisher, you shall not arraign the whole class to which I belong, in the forum of public opinion,—you shall not act as a public censor over the professional morals of that class of men—unless you can show yourself worthy of such a censorship. It is not enough that you have never levied blackmail upon public men. It is not enough that you have never stolen that which belonged to your neighbors. It is not enough that you have never paid the salaries of witty writers out of moneys plundered from the revenues of the government. You can not face the tribunal before whom you plead, with the leer of a convicted thief, and say: 'We will do it again if we can get a chance.' You must not insult that high tribunal by printing, side by side with your bill of indictment against the legal profession, the advertisements of men seeking assignations with women for the purpose of prostitution, nor the cards of divorce shysters who, through fraud and perjury, pursue the nefarious work of destroying the happiness of families, nor the filthy advertisements of quack doctors of secret diseases. You must not thus become the organ of pimps, shysters and quacks, and the purveyor of prostitution, fraud and filth. But you have done this in the very number in which you arraign the legal profession, and you constantly do it. And what is worse, you do not do it, like the lawyers whom you accuse, for a stake of some magnitude; but you do it for the paltry sum of ten cents a line or less; and thus the consideration is as contemptible as the work is filthy and nefarious. Wash this filth from your own hands, before you assume to act as a censor over others."

Publishing the cards of divorce shysters is only one of the ways in which these censors of professional morals corrupt the administration of justice. In publishing legal notices, a practice prevails among newspapers in Saint Louis, in New York, in Boston, and, we believe, in other cities, of rendering a bill for the statutory fees and receipting therefor, and then giving the attorney, sheriff, trustee, or other person furnishing the advertisement a rebate of twenty-five per cent. This rebate generally passes under the name of "agent's commission," or something of the sort, and is understood to be a private perquisite to the person furnishing the advertisement—a sort of "divide" between him and the publisher. We have no doubt that, in nine cases out of ten, the amount shown on the face of the bill is charged up against the client, *cestui que trust*, or other person paying the costs, and, of course, the "commission" comes out of his pocket. Thus persons acting in a fiduciary capacity are drawn into the practice of swindling those for whom they act, by means of false vouchers—a practice more reprehensible than common stealing. We hardly know what course to recommend with a view to breaking up the practice. We suppose that a little reflection will convince every lawyer that it is his duty to accept the rebate and give his client the benefit of it. But sheriffs and trustees who are not members of the profession are not so easily convinced. We can hardly expect the Bar Association to take hold of it now; for, from what we can learn of the extent of the practice, we are afraid that many, even of that respectable body, would not be found to have "clean hands" in this respect. Perhaps some of our readers can make some useful suggestions.

A NEW QUESTION IN LIFE INSURANCE.

The crucial character of the ordeal through which the system of insurance on human lives is now passing, is well illustrated in the case we publish in this issue, of The Equitable Life Assurance Society v. McLennan. It was contended in this case, by the representatives of an insured person, that the insurer was disabled from making a contract of life insurance in the usual and ordinary form, by the existence in its charter of a clause relating to forfeitures, which it is fair to presume was never in the consideration or contemplation of the persons who composed the corporation, as having any control over the question of the form of the contract. That charter-provision allowed the board of directors, in certain cases, to declare policies forfeited. The company organized under that charter had, in pursuance of power to make contracts and fix their terms, adopted and put into common use, and had used in this case a form of contract which provided that, in cases of failure to pay stipulated premiums on the day agreed, the contract should *cease and determine*. This language is not apt, to express a forfeiture of the contract, imposed or insisted on by the one party. Especially is this distinction true of a contract in which the provision for its self-cessation applies only in cases of a failure to pay premiums when due, which is the precise difficulty requiring an adjudication in the McLennan case.

It appears, however, to have been assumed in the argument and conduct of the case by the representatives of the insured, that the only effect of such a provision in the contract was a forfeiture. On this assumption the ingenious argument was based, that the charter-provision as to forfeitures must be followed literally, and that the policy could not "cease and determine" under its own provisions, in default of specific action to that end in the individual case, by the board of directors. This case would give us the assurance, if any such were needed, that no scheme can be expected to remain untried, which the ingenuity of man can invent, by which the representatives of the decedent may hope to escape the consequences of his own failure to comply with the self-imposed terms of his own contract for insurance upon his life.

We assume that no respectable court ever intends to interfere between, and make a contract for the parties, which they have not made for themselves, in cases of insurance, any more than in any other class of contracts. But it must be confessed that the decisions of many courts trench very closely on the line between the construction and the *re-construction* of insurance contracts, if, indeed, they do not overstep it. In the McLennan case, the appellate court was very plainly invited to remodel and re-construct the contract, as the inferior court had already done. It would have been in no less degree the making of a new contract, because done under the form of enforcing a charter-provision of the defendant corporation. From the perspicuous exposure by the Tennessee Supreme Court of the fallacy indulged by the inferior court, one may see, if never before, how totally subversive of the terms of the contract would have been the strict construction of the society's charter, which was contended for.

The argument in favor of this construction was plausible. Perhaps in earlier days it would have been more potent. But from the time of Head v. Providence Ins. Co., 2 Cranch. 167 (1804), down to Franklin Ins. Co. v. Colt, 20 Wall. 560, 2 Cent. L. J. 207, (1874), the change was very great in the judicial doctrine as to the general power of insurance corporations, in respect to the form in which they might make contracts. The former case had allowed them to contract only in writing, that mode being pointed out in the charter as proper. The latter case confined the regulations of the charter concerning the form of contracts, to written contracts alone, and allowed as to parol contracts a latitude commensurate with the usual and customary manner of corporations acting by and through agents. The principle of this case, like that governing the McLennan case, recognizes all the incidents pertaining to the usual manner of executing the corporate powers, as necessarily within the purview of the act creating the corporation.

The decision in the McLennan case is remarkable for the clearness with which the respective rights of the parties to the contract are illustrated. Perhaps no authority has more lucidly stated the unilateral features of the life insurance contract. Paradoxical though it may seem, that form of contract is unilateral on both sides. There are features of it which benefit the insurer alone; there are other provisions which secure rights to the insured alone; but the contract remains unilateral in these several respects, because these respective provisions of the contract are in no manner dependent upon each other. These peculiarities of life insurance have received less attention from the courts, than have its aleatory features. They were forced upon the consideration of the Tennessee court in view of the question before referred to, whether a condition for the determination of the policy on its anniversary is a normal feature of the contract. The contrast and the distinction between this case and that of New York Life Ins. Co. v. Statham, 3 Cent. L. J., 723, are suggestive. The opinion of the Supreme Court of the United States in the latter case was positive and unambiguous, that the contract of life insurance "is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums."

The McLennan case, on the contrary, holds that the contract is one of assurance for a year, with a right to continue it from year to year; this right not implying any correlative duty of the assured, nor conferring any corresponding right upon the other contracting party, but being rather a privilege wholly optional, and thus unilateral. Singularly enough, these two learned courts, traveling by roads so widely different, have reached the same ultimate result. In both cases the conclusion is, that the payment of the premium on the policy anniversary is a condition precedent to the continuance of the policy. In one court, the failure to make such payment operates as a forfeiture of all rights under a contract covering the whole life of the insured, by virtue of a condition co-existent with the contract itself. In the other court, it is regarded not so much as a *forfeiture*, as a failure of the insured to accept the terms of the contract and avail himself of the privileges it confers. In both the Statham and the McLennan cases, it will be observed that the operative clause of the condition in question is the same. We think the definition and illustration of this condition by the Tennessee court the clearer and more satisfactory of the two. The policy provides that, in a given contingency, it shall *cease and determine*. Technically, there can be no forfeiture of rights that have ceased and determined. To interpolate, in such a case, first a forfeiture and then an agreement of the parties that the forfeiture shall annul the contract, is to interpose a superfluous fiction of law, only to knock it down like any other man of straw.

We have deemed this case of special importance, because it is, as we believe, the first reported case in which such a clause in an insurance charter has been urged as a "disabling act," though it is a clause of common occurrence in such charters. We are informed of but one other case in which the question has been raised—a case in the United States Circuit Court for Western Tennessee, some months since, involving the charter of the Globe Mutual Life Ins. Co. of New York, in which case Ballard, J., made the same ruling that has now been made by the Supreme Court of Tennessee.

J. O. P.

THERE is a man in New York who seems to have the most sublime faith in the ancient maxim that there is no law without its appropriate remedy. He answered an advertisement in the matrimonial column of the Herald, and exchanged photographs with a San Francisco widow. Satisfied with her picture, he agreed to marry her, and went on to the latter city to complete his contract. The original fell so far behind the portrait as to induce him to sue the photographer, in an action for false representations, for the small sum of $5,000.

BANKRUPTCY—PROOF OF CLAIMS—ERROR TO CIRCUIT COURT.

WISWALL *ET AL.* v. CAMPBELL *ET AL.*

Supreme Court of the United States, October Term, 1876.

Proceedings by creditors to prove their demands against the estate of a bankrupt, are part of the suit in bankruptcy, and not separate and independent suits; therefore the judgment of the circuit court, upon an appeal from an order of the district court rejecting a claim presented by a supposed creditor against the estate of a bankrupt, can not be re-examined in the Supreme Court upon a writ of error.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Chief Justice WAITE delivered the opinion of the Court:

This writ of error brings here a record of the circuit court for the northern district of Illinois, in a proceeding upon an appeal taken under section 4984, Rev. St., from an order of the district court rejecting a claim presented by a supposed creditor against the estate of a bankrupt. A motion is now made to dismiss, upon the ground that judgments of the circuit courts in such cases are not reviewable here upon error.

By section 691, Rev. St., "all final judgments of any circuit court * * * in civil actions, brought there by original process, or * * * removed there from any district court by appeal or writ of error, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars [now five thousand], may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error." If we have jurisdiction of this case, it is by virtue of this statute.

The cases are numerous in which it has been decided that we can not review the action of the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt law. Morgan v. Thornhill, 11 Wall. 74; Hall v. Allen, 12 Wall. 454; Mead v. Thompson, 15 Wall. 638; Marshall v. Knox, 16 Wall., 555; Coit v. Robinson, 19 Wall., 274; Stickney v. Wilt, 23 Wall. 150; Sandusky v. National Bank, Id., 293. The principle upon which these decisions rest is, that a proceeding in bankruptcy, from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the bankrupt court in the progress of the cause are not distinct suits at law or in equity, but parts of one suit in bankruptcy, from which they can not be separated. As our jurisdiction extends only to a re-examination of final judgments or decrees in suits at law, or in equity, it follows that we have no control over judgments and orders made by the courts below in mere bankruptcy proceedings.

The circuit and district courts have concurrent jurisdiction of "all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee touching any property or rights of the bankrupt, transferable to, or vested in such assignee" (Rev. St., sec. 4979); but such suits, when prosecuted, are no part of the bankruptcy proceeding. They are in aid of such a proceeding, but while progressing are entirely separate from and independent of it. They are used by the bankrupt court to settle the rights of parties who are not subject to its jurisdiction in the suit in bankruptcy, and who, therefore, can not be affected by any judgment or decree that may be made in that cause. Appeals and writs of error to this court in such suits are allowed, and these are the appeals and writs of error referred to in section 4989.

The question, then, to be determined in this case is, whether proceedings by creditors, to prove their demands against the estate of a bankrupt, are part of the suit in bankruptcy, or separate and independent suits at law or in equity.

To entitle a creditor to have his demand allowed, he must verify it in the manner provided by section 5077, and when so verified, it must be delivered to the register having charge of the case. Sec. 5079. If the proof is satisfactory to the register, he is required to deliver it to the assignee, who must examine and compare it with the books and accounts of the bankrupt. It is the duty of the assignee, also, to register in a book to be kept by him for that purpose, the names of the creditors who have proved their claims, in the order in which the proof is received, stating the time of the receipt of the proof and the nature and amount of the debts. This book is open to the inspection of all creditors. Sec. 5080. The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or when the proof shows the claim to be founded in fraud, illegality, or mistake. Sec. 5081. The court must allow all debts duly proved, and cause a list thereof to be made and certified to one of the registers. Sec. 5085.

So far, clearly, a proceeding to prove a debt is part of the suit in bankruptcy. It has none of the qualities of an independent suit at law or in equity. By sec. 4980 any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court of the same district. Such appeal (sec. 4982) must be entered at the term of the circuit court which shall be held within the district, next after the expiration of ten days from the time of claiming the same, and, on entering it (sec. 4984), the supposed creditor must file in the clerk's office of the circuit court "a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in the like manner, and like proceeding shall thereupon be had in the pleadings, trial, and determination of the cause, as in actions at law commenced and prosecuted in the usual manner in the courts of the United States, except that no execution shall be awarded against the assignee." The final judgment of the circuit court rendered upon the appeal is, by sec. 4985, made conclusive, and the list of debts must, if neccessary, be altered to conform thereto. Even under the operation of these provisions of the statute, the proceeding originally commenced as part of the bankruptcy suit is not, as we think, separated from it and converted into a suit at law. The form of the proceeding in the appellate court must conform to that of a suit at law; but that does not make the proceeding itself such a suit any more, than a proceeding in the circuit court under its supervisory jurisdiction is a suit in equity, because by sec. 4986 it is provided that it shall be heard and determined "as in a court of equity."

Congress in enacting the bankrupt law had apparently in view, 1, the discharge under some circumstances of an honest debtor from legal liability for debts he could not pay; and, 2, an early pro-rata distribution, according to equity, of his available assets among his several creditors. Prompt action is everywhere re-

quired by law. In Bailey v. Glover, 21 Wall. 346, we said, speaking through Mr. Justice Miller, that "it is obviously one of the purposes of the bankrupt law, that there should be a speedy distribution of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay." The list of debts "entitled to share in the bankrupt's property," (sec. 5091), is an important element in the settlement of the estate. Without it there can be no dividend. Hence the necessity for as "quick and summary" a disposal of the questions arising under this part of the case as is consistent with the reasonable protection of the rights of the parties in interest. Every person, submitting himself to the jurisdiction of the bankrupt court in the progress of the cause for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding. A creditor who offers proof of his claim and demands its allowance, subjects himself to the dominion of the court and must abide the consequences. His remedies for the purpose of this proof are prescribed by the law. As has been seen, he must first submit his case to the register. It is then examined by the assignee, who must record it in a book open to the inspection of creditors. An opportunity is then given to parties in interest to call upon the district court to take further testimony and pass upon the claim. That court must then decide, and from its decision an appeal may be taken to the circuit court, where further litigation may be had; but when that court acts, all parties are concluded. The judgment of that tribunal is final. From it no appeal lies. There is no more hardship in this than in holding that the action of the circuit court, under the supervisory jurisdiction provided for in sec. 4986, is conclusive and not subject to re-examination here.

This is in accordance with the views expressed by Mr. Justice Clifford, when he delivered the opinion of the court in Morgan v. Thornhill, 11 Wall. 65. As, however, the question was not then directly presented for adjudication, the same learned justice subsequently saw fit, in Coit v. Robinson, 19 Wall. 284, to leave it open for further consideration. Now, however, when the question is fairly presented and after it has been fully argued, we are clearly of the opinion that what was thus said in Morgan v. Thornhill was correct, and that we have no jurisdiction upon error in this class of cases.

The motion to dismiss for want of jurisdiction is, therefore, granted.

LIFE INSURANCE—CESSATION OF CONTRACT—FORFEITURE—CHARTER.

EQUITABLE LIFE ASSURANCE SOCIETY v. McLENNAN.

Supreme Court of Tennessee, September Term, 1876.

HON. JAMES W. DEADERICK, Chief Justice.
" PETER TURNEY, } Associate Justices.
" THOS. J. FREEMAN, }
" ROBERT MCFARLAND, }
" J. L. T. SNEED, }

1. LIFE INSURANCE—CHARACTER OF CONTRACT—PAYMENT OF PREMIUM.—The ordinary contract of life insurance is an insurance for a year, with the right in the assured of continuing it in force by successive periodical payments of premium.

2. CESSATION OF CONTRACT—POWER OF CORPORATION.—A clause in the policy providing that, on failure to pay any annual premium, the policy shall cease and determine, is a contract within the usual and ordinary powers of a corporation created for the purpose of engaging in the business of life insurance.

3. CHARTER PROVISIONS—FORFEITURE.—Such powers are not limited by a provision of the charter of the corporation allowing its board of directors to declare a policy "forfeited" for failure to pay the premium. Such charter provision may well have reference to policies not containing provisions for their own cessation in such case.

Kortrecht, Croft & Scales, for appellant; *Vance & Anderson*, for appellee.

MCFARLAND, J., delivered the opinion of the court:

This is an action upon a policy of insurance upon the life of John McLennan, in favor of his wife, in which the judgment was for the plaintiff. The question was, whether the policy was in force at the date of McLennan's death, on the 3rd day of July, 1869. For the defendant it was insisted that the contract had ceased to exist by reason of the failure to pay the annual premium, falling due on the 4th of April, 1869; while for the plaintiff it was maintained, that this failure to pay the premium only gave to the board of directors the power to declare the policy forfeited; but no such action having been taken by the board of directors before the death of McLennan, that the policy remained in force, and that the plaintiff having afterwards tendered the premium, was entitled to recover. The circuit judge construing the contract, with certain provisions of the charter, decided the question presented in favor of the plaintiff; the defendant appealed.

The terms of the policy, in substance, are: That in consideration of representations made in the application, and of $286.20 in hand paid by Susan McLennan, wife, etc., and of the annual premium of $286.20, to be paid on or before the 4th of April every year, the company do assure, etc. Provided always, and it is declared to be the true intent and meaning of the policy, that if the assured should, without the assent of the society previously obtained, travel in certain forbidden localities, or provided he should engage in certain forbidden occupations, or die by his own hand or the hand of justice, or in consequence of a duel, or of violation of law, the policy is to be null and void and of no effect. And it is also understood and agreed, if the declaration made in the application for the policy be found in any respect untrue, then the policy shall be null and void; or in case the said premiums shall not be paid on the several days hereinbefore mentioned for the payment thereof, then, and in any such case, the said society shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine.

It is impossible to undertake to review the various decisions upon this general subject. This branch of the law has become a very extensive one, and we can only give our conclusions, which will be found supported by a fair proportion of the authorities.

We think the true nature of this contract may be stated about as follows: The applicant, upon the payment of the first premium and the execution and delivery of the policy, effects an insurance upon his life for one year, and also acquires a right to continue that insurance at the same rate from year to year during his life; but whether he will continue the policy from year to year, is purely optional with the assured. He can not be compelled to do so; on the other hand, if he continues to pay or tender the premiums as stipulated, the insurers are bound by the contract to receive them and continue the contract in force, no matter how bad the risk may become. The rate of insurance for a single year, without more, would be less; but

where the assured acquires the right to continue the policy for life upon the annual premium, he does so by paying an increased rate, supposed to be equivalent to this undertaking on the part of the insurers.

In this view it is certainly competent for the parties to contract that, in order to continue the policy in force from year to year, the premiums must be paid on or before the days designated. A failure to pay on or before the day, is not to be regarded so much as a *forfeiture* of a right, in the sense of forfeitures, as applied to the other branches of the law, as it is to be regarded as a mere failure to accept the terms of a contract which he had the option to accept on or before that day by paying the money; or an election on his part not to continue it any longer. Of course the parties might afterwards by consent extend this time, and continue the contract in force by accepting payment of the premiums at any time. The right to continue a contract in force, by paying the premiums on or before the days specified, is at the option of the *assured*; but after the expiration of the time, the acceptance of the premium is at the option of the *insurer*. This we think to be the general current of the authorities upon the construction of policies similar in their terms to this one; and such was the opinion of the circuit judge, as to the proper construction of this policy, looking alone to the policy itself. But this construction, he holds, was changed by the following provisions of the defendant's charter, to-wit: "Sec. 6. All premiums shall be payable in cash. In case any policy-holder shall omit to pay any premium due from him to the company, or violate any other condition of the policy of insurance, the board of directors may forfeit his policy and apply all previous payments to the benefit of the company." The argument presented in support of the ruling of the circuit judge, and urged with great force and plausibility, is that the charter must be taken as a part of the contract, and that the corporation could only act in the manner authorized by the charter, and by this the company could only contract for a forfeiture of policies, in the event the board of directors should elect so to treat the failure to pay the premiums, and so declare by formal action upon their part. The power to declare a forfeiture is not given to the company in any other way, or allowed to be exercised by the corporation, otherwise than by its board of directors, and that the power to declare forfeitures must be strictly construed. This argument, in short, realizes the conclusion that, although by the terms of the contract appearing upon the face of the policy, it ceased to exist because of the failure to pay the premium when due, in fact the company had no power to make such a contract; that it could only contract that, in the event the premiums were not paid, the board of directors might, by formal action, declare the policy forfeited; but if, before this was done. the assured died, then as the policy continued to exist up to the death, the company were liable; and that this being the only contract the company could make, this policy must be construed accordingly.

On the other hand, it is maintained that the power to make all contracts usual and incident to the business of insurance is necessarily vested in the society, by the terms of the incorporation, which vest it with the power to engage in the business of life insurance; and that the clause in question was not intended to limit the powers of the company as to the terms of contracts to be made, but only to make more certain the power in this particular. It will be found that the charter does not undertake to specify the precise terms of the policies to be issued. It provides that, "the directors may determine the rates of premiums and the amount to be insured on any one life, and the terms of such insurance." We are of opinion that the corporation had the power to make all contracts incident to the issuance of life policies, in accordance with the usual course of such business. This results from the very creation of the corporation for the specific purpose of engaging in the life insurance business, without undertaking in the charter, what would have been very unusual, if not impracticable, that is, to prescribe the terms and conditions of the contract of insurance to be entered into by the company. The corporation was created, and given the power to contract, and necessarily it must have the power to agree with individuals as to the terms of contracts of insurance to be made with them. Unless this power be restricted by the terms of the charter, as we have seen, the power to fix the terms of the insurance is expressly given to the directors, and contracts entered into in due form must be taken as entered into by the authority of the directors; otherwise the policy in this instance would be inoperative.

We are further of opinion, that the 6th clause of the charter does not negative the existence of the power in the corporation to make a contract of insurance with such stipulations as may be agreed upon, or at least such as are usual in such cases.

We conclude, therefore, that the corporation might make a contract by which the failure to pay the and nual premium at the time agreed upon would terminate the insurance. It might, however, make a contract without such stipulations, and to this latter character of contracts, the terms of Sec. 6, giving the power to the board of directors to declare the policy forfeited, might apply. In other words, we hold that it was competent for the contracting parties to agree, by the contract itself, that the failure to pay the premiums as they fell due should terminate the risk without more. That the corporation had the power to make such a contract, by the terms of its creation, and the existence of its power, is not negatived by this section.

To hold, as the circuit judge held, that the power to declare the forfeiture could only be exercised by the action of the board of directors before the death of the assured, would often render the provisions of this section nugatory. This section provides, "in case any policy-holder shall omit to pay any premium, or violate any other condition of the policy of insurance," the board of directors may forfeit his policy, etc. A policy-holder might violate the condition of the policy against traveling in forbidden districts, might visit infected localities, contract a contagious or infectious disease and die, before any knowledge that he had thus violated any of the conditions of the contract could come to the officers of the company. In such case, although the violation be clearly shown, yet, as the company did not have knowledge of the violation in time to summon the board of directors and have a forfeiture declared before the party died, the benefit of the stipulation would be lost to the company altogether. This construction would defeat altogether the condition avoiding the policy, in cases where the policy-holder dies by his own hand, or in consequence of a duel, as in such case the policy-holder most likely would be dead before the violation could be known and come before the board of directors, and they could declare the forfeiture. And so also to some extent might be the result in cases of failure to pay the premiums at the times agreed upon. Before the home office could receive information from its district agent, of a failure to pay the premiums upon the day due, and have the action of the board of directors thereon, the insured might die, and thus defeat altogether the rights of the company to declare a forfeiture for such non-payment. We see nothing to change the result in the fact of this being a mutual company. Every policy-holder being, in a sense, a member of the corporation, and charged with knowledge of the contents of the charter, might

certainly make a contract agreeing to forfeiture in a different mode.

We have examined many of the numerous authorities referred to, but, without commenting thereon, we hold the law in accordance with this opinion, and, for the error stated, reverse the judgment and remand the cause.

REAL ESTATE BROKER'S COMMISSION.

LOVE *ET AL.* v. MILLER *ET AL.*

Supreme Court of Indiana, January Term, 1877.

HON. JAMES L. WORDEN, Chief Justice.
" HORACE P. BIDDLE,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS, } Judges.
" WILLIAM E. NIBLACK,

1. COMPLETED SALES.—To complete a sale of personal property, either an actual or potential delivery of the article sold is neeessary; but in sales of real estate, a contract to convey may be held to be a sale.

2. BROKER'S COMMISSION—WHEN EARNED.—The rule that "no brokerage is due until the consideration has passed to the vendor," is not supported by authority. When the broker has effected a bargain and sale by a contract which is mutually binding on both vendor and vendee, he is entitled to his commission, whether the sale is finally executed or not.

3. OBITER DICTA.—There is nothing authoritative in a decision of a court, except what is required to be decided, in order to reach a final judgment on the questions at issue between the parties.

APPEAL from the Marion Superior Court.

BIDDLE, J., delivered the opinion of the court:

The appellants were real-estate brokers in the city of Indianapolis; the appellees were owners of certain real estate situated in the city. The parties mutually agreed that, if the appellants would "find a purchaser or make a sale of said real estate," they should receive for their commission $1,000, which the appellees agreed to pay. In pursuance of this agreement the appellants procured an offer for the real estate mentioned from John Wymond, which was accepted by the appellees. The offer and acceptance are in the following words:

"To Messrs. Miller and Crawford:

GENTS:—I will give you, for your property on the corner of Washington and Mississippi streets, in the city of Indianapolis, Indiana: I will assume $45,000 now on the property, after deducting the back interest, and give you my dwelling property in which I now reside at Lawrenceburg, Indiana, and pay you $5,000 in cash, and I am to have the rents from December 1st, 1873.

Indianapolis, Dec. 4, 1873.

[Signed] JOHN WYMOND."

"We accept the above proposition.

[Signed] SCOTT MILLER,

[Signed] J. MONROE CRAWFORD."

On the 8th of December, 1873, the parties met at the office of the appellants to carry out the agreement by executing the proper conveyances interchangeably, and paying and receiving the purchase-money. After some talk between and amongst the parties, Wymond became dissatisfied with the agreement as a bargain, and refused to execute his part of it, whereupon the appellants informed the appellees that they (the appellees) could hold Wymond to his agreement, and that they (the appellants) should hold appellees for their commission of $1,000. These are the essential facts of the case. The appellees refused to pay the commissions, and the appellants brought this suit. The finding and judgment below were against the appellants.

The main question there was, and here is, are the appellants entitled to recover their commission against the appellees, upon the facts stated? and the case, we think, turns upon the sole question whether the offer and acceptance, as set forth, amounts to "finding a purchaser or making a sale" of the real estate described, or not, within the agreement made between the appellants and appellees. The question involved in this case has never before been presented in this state, we believe; indeed, we have very few reported cases in any way touching the subject-matter of brokers' commissions. The authorities of other states do not seem to entirely agree; but, upon close analysis, it does not appear that they are in serious conflict.

To complete a sale of personal property, either an actual or potential delivery of the article sold is necessary, unless there is some different special stipulation in the agreement. In ancient times it was necessary, in the sale of land or a tenement, to complete the right of possession by the delivery of a turf or clod, which ceremony was called the *livery of seisin;* but, in the advancement of civilization and intelligence, when written deeds were introduced, this cumbrous and symbolical performance fell into disuse, and has long since been abolished. A bargain and sale, since the enactment of the statute of "uses and trusts," is a kind of real contract, whereby the bargainor, for some pecuniary consideration, bargains and sells—that is, contracts to convey the land to the bargainee—and the statute of uses completes the purchase; or, as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession. 2 Blackst. 338. Indeed, a conveyance in trust is frequently nothing more than a contract that the trustee shall convey the land in some special manner, or to some particular person, or as the *cestui que use* may direct. According to this view, a contract to convey may be held as a sale. No question has been made in this case as to the validity of the contract between the vendors and vendee.

The following cases are cited on behalf of the appellees: McGavock v. Woodlief, 20 How. 221. In this case the vendor gave his broker specific directions to sell his plantation and slaves for $130,000, of which $20,000 was to be paid in cash, and the remainder in five equal annual installments, with interest. The broker found a purchaser, George M. Long, who agreed to these terms; but, when they proceeded to execute the contract, Long and the broker changed the terms of it, by substituting Long's wife as the purchaser, and were to negotiate certain notes she held against Dr. Bard to apply on the $130,000, and made no specific arrangement at all as to the payment of the $20,000. To this new agreement, as far as the evidence showed, the vendor never consented. The case, in short, is this: The vendor directs the broker to sell his property according to specific terms; the broker ultimately changes the terms to another contract, to which the vendor never agreed. Upon this ground it was held that the broker could not recover for his commission, and, we think, very properly; but it is quite a different case from the one before us. True, Mr. Justice Nelson, in delivering the opinion of the court, says: "Certainty in the offer to fulfill is as important to the vendor as in the terms of the sale to the vendee, and equally necessary before the vendor can be put in fault. The broker must complete the sale—that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commission." These words, however, must be held to have been spoken, not generally, but in reference to the purchase according to the terms specifically given to the broker by the vendor. Richards v. Jackson, 31

Md. 250. This case supports the appellees in principle. There was a clause of forfeiture, however, in the contract, by which the purchaser could abandon it on payment of $250. But the decision of the case was not put upon this ground. Read v. Rann, 10 Barn. & Cress. 438. This case turns upon the point in question, but is not analogous to the case we are considering. The suit was brought upon a *quantum meruit* count, and the proof showed a special contract unfulfilled; and upon this ground the broker failed to recover, Park, Justice, remarking: "The claim of the plaintiff rests on the custom, and not on a *quantum meruit*. The custom supposes a special contract between the parties, and, if that is not satisfied, no claim at all arises; for no other contract can be implied." Kimberly v. Henderson, 29 Md. 512. In this case the brokers brought the vendor and vendee together, and they executed certain papers, "whereby they respectively contracted for the sale and purchase of the property, with a stipulation that, in case either party should fail to comply with the contract, a forfeiture of $1,000 should be paid by the party in default to the other." The vendee failed to comply with the contract, and paid the forfeiture. This contract could not be mutually enforced between the vendor and vendee, and upon this ground it was held that the brokers could not recover for their commission. Avery, J., in delivering the opinion of the court, remarked: "Here the undertaking failed. A party was produced, it is true, and a contract entered into through the agency of the appellees, but of such a character that the party contracting, by the exercise of an option given him, relieved himself of the obligation to complete the purchase, and did not, in fact, become the purchaser." Besides, the brokers inserted a clause in the contract which was not communicated to their principal. True, in this case there is a *dictum* spoken by the judge, which would seem to support the view taken by the appellees; but that, we might suppose, was spoken of the contract before him, and not as a general principle applicable to all contracts for a brokers' commission; at least, being a mere *dictum*, it is not authoritative. De Santos v. Taney, 13 La. An. 151. De Santos, a real estate broker, was employed by Taney to sell three houses. Avegno made an offer through De Santos to Taney to buy the houses for $15,500, which Taney accepted in writing. When the parties met to have the papers signed by Avegno, he and Taney disputed about the payment of the taxes on the property, Avegno insisting that, by the agreement with the brokers, he was to pay but two-twelfths of the taxes, while Taney insisted that his intention was to have the sum named for his property without any deduction for taxes; upon this the parties disagreed, and the contract was not consummated. And the decision of the case was made to turn upon the point that the contract failed "on account of the broker's neglect to stipulate clearly concerning the taxes." This case, in its premises and conclusion, does not support the appellees; though Buchanan, J., said: "But all the authorities confirm the doctrine of Judge Martin, as we understand it, that no brokerage is due until the sale is complete and executed—that is to say, until the consideration of the sale has passed to the vendor." We are not convinced that all the authorities confirm this proposition; indeed, we have been unable to find one that carries the doctrine to such an extent. Spofford, J., in the same case, expresses an opposite opinion. He says: "I do not think it necessary that the consideration should have passed; but I consider brokerage earned so soon as the broker has effected a complete bargain between the parties." Here are two *dicta* from different judges, in the same case, quite opposite, while both agree as to the principle upon which the case is decided. This is a strong instance to warn us from following what a judge says, instead of what a court decides. The *dictum* of a judge is very different from the decision of a court, although the judge and the court may be the same person, and the *dictum* and decision in the same case. There is nothing authoritative in a case except what is required to be decided to reach the final judgment, and what by the judgment becomes *res adjudicata* between the parties as to the subject-matter of the suit.

We have thus carefully examined all the authorities cited by the appellees, and considered the argument in support of their views; but we are unable to adopt the extreme rule contended for by them—approved but by the single case of Richards v. Jackson, and expressed *obiter* by only one of the judges in the case of De Santos v. Taney, *supra*—namely, "that no brokerage is due until the sale is complete and executed, and the consideration of the sale has passed to the vendor." This rule is not supported—indeed, we think it is quite overthrown—by the current of authorities; nor does it seem to us to be applicable to the state of Indiana. In this state, lands are bought and sold almost as freely as commodities; they are often mortgaged or pledged as a basis of business operations; sales are made upon deferred payments, for the purpose of holding them as investments; conveyances are frequently executed in trust for the convenience of the parties; large quantities of land are held by executive contracts to facilitate transfers by assignments; in many of which cases the consideration is not paid, and not to be paid, and the title conveyed in fee, for months and even years after the sale is made, possession given, and full enjoyment had. Under such circumstances, to adopt a rule which would deny the broker his commission until the consideration was paid and the final conveyance executed, would be manifestly unsuitable to our condition, and, we think, unjust. We are of opinion that when the broker has effected a bargain and sale, by a contract which is mutually obligatory on the vendor and vendee, he is entitled to his commission, whether his employer chooses to comply with or enforce the contract, or not. The following authorities support us in our conclusion: Cook v. Fiske, 12 Gray, 491; Drury v. Newman, 99 Mass. 256; Middleton v. Findla, 25 Cal. 76; Knapp v. Wallace, 41 N. Y. 477; Stillman v. Mitchell, 2 Robertson, 523; Higgens v. Moore, 34 N. Y. 417; Heinrich v. Korn, 4 Daly, 74; Rice v. Mayo, 107 Mass. 550; Mooney v. Elder, 56 N. Y. 238; Barnard v. Monnot, 40 N. Y. 203; Chapin v. Bridges, 116 Mass. 105.

The case of Lane v. Albright, 49 Ind. 275, is in harmony with the above authorities in principle, though not in point, as to fact, with the case we are considering. In that case the agent was negotiating a sale, but was prevented from completing it by the act of the vendor in making the sale himself; in this case the brokers had completed the sale, but the vendors refused to enforce the contract. We can see no distinction between the cases in principle, as to the rights of the agent or the brokers. In the one case, as the failure to complete the contract was not the fault of the agent, we held that he was entitled to his compensation; in this case, as the failure to enforce the contract after its completion was not the fault of the brokers, we must hold that they are entitled to their commission.

The judgment is reversed, cause remanded, with instructions to sustain the motion for a new trial and for further proceedings.

Petition for rehearing overruled.

A CORRESPONDENT in Arkansas writes: "May I suggest the following additions which might be made to your list of 'Law Books as Gift Books' (Vol. 4, No. 5, notes). For a stockbreeder: Ram on Facts. For the conventional mother-in-law: Grady on Fixtures. For the grand army of office-loafers: Wood on Nuisances."

VERDICT RENDERED ON SUNDAY.

REID v. THE STATE.

Supreme Court of Alabama, December, 1876.

HON. R. C. BRICKELL, Chief Justice.
" A. R. MANNING, } Associate Justices.
" GEO. W. STONE, }

The verdict of a jury, rendered on Sunday, is valid.

MANNING, J., delivered the opinion of the court:

The object of taking the bill of exceptions was to bring before this court only certain matters which occurred at the time of the retirement of the jury to deliberate on their verdict and afterwards. The following are the substantial facts deducible from the record:

The final charge of the court to the jury was finished at twenty minutes before twelve o'clock Saturday night; and it being so near to Sunday morning, it was by defendant, who was present, consented in open court through his counsel, that if the jury agreed upon their verdict after twelve o'clock and during the Sunday following, they might seal it up, deliver it sealed to the clerk of the court, and separate to meet again on the following Monday morning, when the court should be in session, and the verdict be then opened and read. The court, however, was not adjourned over to that day. About one o'clock Sunday morning the jury reported that they had agreed on their verdict, and it was sealed up and delivered to the clerk and they were permitted to disperse. But after this, defendant having come in, and the judge, jury, sheriff and counsel having re-assembled at the court-house about three o'clock Sunday morning, and it having been agreed by the counsel for defendant, in his presence, that the verdict might then be received and the jury discharged—the envelope was opened and the verdict read. Whereupon the judge informed the jury that they were discharged for the term, and ordered the court to be adjourned to the ensuing Monday morning. On the latter day, court being in session, and the defendant present, and the cause called, it was laid over until the next day, at the request of his counsel. And on the next day (Tuesday), the defendant with his counsel being present, the verdict of the jury was read in open court in their presence, they also being then there by request of the judge. A motion was now made for a new trial, upon allegations of the influence of public prejudice upon the jury, and of newly discovered evidence, but was denied. A further motion followed, made by another attorney, who, after the opening of the verdict on Sunday, had been engaged to represent defendant, his original counsel refusing to participate therein, for the discharge of defendant, "on the ground that the verdict was received on Sunday, and that the jury was illegally, improperly and unauthorizedly discharged, without the consent, in open court, of the defendant;" which motion being overruled, defendant excepted, and judgment was rendered against him. It is now here insisted that, Sunday being *dies non juridicus*, everything that was done on that day is null and void.

If the term of the city court had been limited to the week ending with that Saturday night, then when the judge determined that the hour of twelve of midnight had arrived, the jury would have been *ipso facto* discharged by the termination of the authority of the court, and nothing of its powers would have "remained, * * * but those necessary to declare that its functions had ceased, and to remand the prisoner." Nabors v. State, 6 Ala. 200; Ned v. State, 7 Port. 187. The judge alone has authority to determine when the hour arrives at which the term of the court expires. Nabors v. State, *supra*. But when the term of the court extends beyond Saturday of one week into and during the next week, a jury to whom a cause has been committed, and who are deliberating on the verdict they shall render, are not dismissed, of course, by the intervention of Sunday. They may be, and, in some cases, must be kept together as an organized body, in charge of the sheriff, until they agree upon and render their verdict, or are discharged in some other legally sufficient manner. The business of courts could not otherwise be transacted. In England, "it has been held," says Blackstone (vol. 3, p. 376), "that if the jurors do not agree before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit, from town to town, in a cart." And, in as much as it must doubtless often happen, that before the end of such a progress one or more Sundays would intervene, this court referred, in Nabors v. State, *supra*, to this curious passage in English judicial administration of former times, as authority for the practice which obtains here and elsewhere, that, while the term is continuing, a jury is not discharged by the advent of Sunday.

It is settled, however, that Sunday is *dies non juridicus*. Haynes v. Sledge, 2 Port. 530; Nabors v. State, *supra*; Story v. Elliott, 8 Cowen, 27; Swann v. Broome, 3 Burrow, 1595. In this latter case the subject was very learnedly argued and investigated, the validity of proceedings for a common recovery being dependent on the solution of it by the court. And it was shown that anciently the courts of justice did sit on Sundays; that this was the custom, especially among Christians; but that certain ecclesiastical canons were afterwards made by which it was prohibited that "causes should be tried or pleas holden" on certain days of the year, including Sunday, which canons were received and adopted by the Saxon kings of England, and afterwards "confirmed by William the Conqueror and Henry the Second, and so became part of the common law of England."

But to what extent do the prohibitions of the common law thus modified reach? In Haynes v. Sledge, *supra*, it was held that a writ, which appeared from the *teste* thereof to have been issued on Sunday, was void. Says Justice Thornton: "The maxim of the common law—*dies dominicus non est juridicus*—as we learn from all the authorities which we consult for its principles, expressly embraced and avoided every original process obnoxious to this objection." The reason of this, as explained by Lord Mansfield, in Swann v. Broome, *supra*, p. 1600, was, that in those days "the awarding of process and the giving of judgment were *judicial acts*." See also to this same point, Van Vechten v. Paddock, 12 Johns. 181. But without this reason the decision in Haynes v. Sledge was correct; because, by a statute of 1803, then in force in this state, it was enacted: "No person or persons, upon the first day of the week, called Sunday, shall serve or execute, or *cause* to be served or executed, any writ, process, warrant, order, judgment or decree (except in criminal cases, or for a breach of the peace); but the service of every such writ, process, order, warrant, judgment or decree shall be void to all intents and purposes whatsoever," etc. Clay's Dig. 593, § 3. And under a precisely similar act in New York, the supreme court of that state, in 1815, following an English decision upon the similar statute of 29 Charles 2d, held that the policy which prohibited the service of the process prevented also the issuing of it on Sunday. Van Vechten v. Paddock, *supra*. But it seems that the Sunday prohibitions of the common law reached only the courts. Its injunctions were all

embraced in the maxim, *dies dominicus non est juridicus*. The Lord's day is not a court day. Judicial acts were held *void*, but not ministerial acts. And no contracts or transactions of individuals entered into or made on Sunday were, on that account, void by the common law. It is only by statute that they are made so. Merritt v. Earle, 31 Barb. 40; Strong v. Elliott, 8 Cowen, 30; King v. Whitnash, 7 B. & C. 596; Flanagan v. Meyer, 41 Ala. 138. In MacKalley's case, (in 9 Co. 66), cited by Lord Mansfield, in Swann v. Broome, "it was objected that Sunday is not *dies juridicus*, and, therefore, no arrest can be made in it, and every one ought to abstain from secular affairs upon that day." But it was answered and resolved: "That no judicial act ought to be done on that day; but *ministerial* acts may be lawfully executed on the Sunday." 3 Burrow, 1601. This was in 9th James I. So in Becloe v. Alpe, on a proceeding for engrossing butter and cheese, contrary to statute, it was assigned for error, "that the information was exhibited in court on the 13th of October, which, in that year (20 James I.), was a Sunday, and therefore not *dies juridicus*." But it was resolved: "That it was good; for although it was not *dies juridicus* for the award of any judicial process, or to *make an entry of [any judgment on record*, yet it was good for accepting an information upon a special law." 3 Burrow, 1599. Both of these cases were decided before the enactment of the Sunday statute of 29 Charles II., and tend to explain what the common law on the subject was.

The only law we have now relating to legal proceedings on a Sunday, is the common law and sections 2578 and 2941 of the revised code, the former of which sections authorizes the issue and execution of bail process, and the latter the issue and execution of writs of attachment on Sunday, if affidavit be made that the defendant is about to abscond or to remove his property. Is there anything in these, or in the common law, to prevent a court from simply meeting and receiving on Sunday morning the verdict of a jury, if they be ready to render it, in a cause which has been submitted to them on the Saturday before? Must the jury] and the sheriff's officers attending them be kept together twenty, fifteen, or any number of hours longer, where, perhaps, they] have neither comfort nor opportunities for religious exercises, rather than that the judge shall meet them for a few minutes in court to have their verdict delivered and to discharge them? Could this have been held to be just or Christian-like, when it was lawful to prevent juries from having food, fire, and other comforts until their verdict was rendered?

The Sunday laws must have a reasonable interpretation. Discussing an act which authorized the *service* of process in certain cases on Sunday, in respect to the legality of its being *issued* on that day, Thornton, J., said; "It would seem to me that, in those instances where, from the urgent necessity of the case, *service* of process is authorized, its *issuance* is, under the same circumstances, rendered a matter of duty; and being provided for the prevention of fraud and iniquity, could not shock the moral and religious sense of the community, as a general disregard of the Sabbath assuredly would." Thus he concluded that the duty of *service* of process on Sunday being imposed by the statute on a sheriff, the corresponding duty of *issuing* the process on that day was impliedly imposed on the clerk in the same circumstances. So we are of opinion that, when a jury, to whom a cause has been committed on a Saturday or other secular week-day, are lawfully kept together under charge of officers of court, and are ready on Sunday to deliver in their verdict, it is lawful for the judge to meet them with the other officers of the court to receive it, and thereupon to discharge the jury, and to adjourn the court until the next day. This is not making Sunday *dies juridicus* within the meaning of the common law.*

We are not without authority to support this conclusion. In the memorable trial at the Old Bailey, in London, in the time of Charles II. (reported at length in 6 State Trials, 951), of the celebrated William Penn and one Mead, for a tumultuous assembly, the cause was given to the jury on Saturday (the 3d of Sept., 1670), who, on the same evening, brought in a verdict, with which the presiding magistrates, who were prejudiced against the prisoners, were very much dissatisfied. Whereupon, after much altercation, and with a declaration by one of the court to the jury, that they should be locked up, without meat, drink, fire or *tobacco*, the jury were directed again to retire, and "the court then adjourned to the next morning, which was *Sunday*, when the prisoners were brought to the bar, and the jury sent for." An abridgment of the report of what then followed is given by Forsyth in his "History of Trial by Jury" (p. 400, *et seq.*,) as follows. *Clerk:* "What say you? Is William Penn guilty of the matter whereof he stands indicted, in manner and form aforesaid, or not guilty?" *Foreman:* "Guilty of speaking in Grace Church street." *Recorder:* "What is this to the purpose? I say I will have a verdict." And speaking to Bushel (one of the jurors), he said: "You are a factious fellow. I will set a mark upon you; and whilst I have anything to do in the city, I will have an eye upon you." *Mayor* (to the jury): "Have you no more wit than to follow such a pitiful fellow? I will cut his nose." *Penn:* "It is intolerable that the jury should be thus menaced. Is this according to the fundamental laws? Are not they my proper judges by the great Charter of England? What hope is there of ever having justice done when juries are threatened and their verdicts rejected? I am concerned to speak and grieved to see such arbitrary proceedings. * * * * Unhappy are those juries who are threatened to be fined, and starved, and ruined, if they give not in verdicts contrary to their consciences." Much more of a like sort took place, and twice on that same Sunday the court met this jury to receive their verdict, and refused to receive it only because dissatisfied with it, and then adjourned to the next day, when a verdict of "not guilty" was rendered. This trial took place at the Old Bailey before the enactment of the Sunday statute of 29 Charles II. And however much we may be shocked at some of its incidents, surely, the practice of this famous criminal court of London, held by its highest magistrates in the capital of the country, which was the home of the common law, may be regarded as establishing that the sitting of a court on Sunday to receive the verdict of a jury was not illegal, according to that common law.

In New York it was held, in 1818, that it was not improper for a court to receive the verdict of a jury on Sunday, but was illegal then to enter judgment on it. Houghtaling v. Osborn, 15 Johns. 119; Story v. Elliott, *supra*. In the revision afterwards of the statute law of New York, the rule of this decision was expressly incorporated in a clause adapted in the words following: "No court shall be open or transact any business on

* A verdict is not equivalent to a judgment, or to the award of arbitrators. Speaking of awards, Yates, J., said, in Van Cortland v. Underhill, 15 Johns. 416: "It certainly would be a dangerous innovation to put them on a footing with the verdict of a jury. They are and ought to be of a more binding force between the parties." And in Strong v. Elliott, *supra*, Savage, C. J., said: "Arbitrators are not only jurors to *determine facts*, but *judges to adjudicate* as the law."

Sunday, unless it be for the purpose of receiving a verdict or discharging a jury; and every adjournment of a court on Saturday to another day shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been committed to the jury. But this section shall not prevent the exercise of the jurisdiction of any single magistrate, when it shall be necessary in criminal cases to preserve the peace or to arrest offenders." Pulling v. The People, 8 Barb. 385. This clause seems to us to express with much precision, what was indeed the common law on the subject without any statute.

Section 3553 of the revised code makes a defendant convicted of libel punishable by fine not to exceed five hundred dollars and imprisonment in the county jail not to exceed six months. And, according to section 3783, the imprisonment must be imposed by the court, unless the discretion is expressly conferred on the jury, which is not done in cases of libel. The court was therefore authorized to add the imprisonment it imposed.

We find no error in the record, and the judgment is affirmed.

NOTE.—At common law all judicial acts performed on Sunday are null and void. But ministerial acts are valid, and the rendering of a verdict by a jury on Sunday, being a ministerial act according to the weight of authority, is legal. Much useless learning, it was said in Cory v. Wilcox, 4 Ind. 373, has been displayed upon this point by able jurists. In Shaw v. McCombs, 2 Bay, 232 (1811), it was held that no verdict whatever could be received on Sunday; but later adjudications are against this ruling, though generally restricting the exemption to the verdict itself, and declaring any supplementary acts of the court on a *dies non juridicus* void. In Arthur v. Mosby, 2 Bibb, 589, part of the evidence was heard, the verdict of the jury made up and returned into court, and the judgment of the court rendered after twelve o'clock on Saturday night. On appeal, the judgment was reversed for error. The judgment in Houghtaling v. Osborn, 15 Johns. 118, is in these words: "It was proper to receive the verdict, presuming that the jury were empaneled before Sunday commenced; but it was illegal to enter judgment on Sunday, and for that cause it must be reversed." In State v. Green, 37 Mo. 466, under a statute of this state, which provides that "no court shall be open or transact business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury," the reading of the instructions to the jury by the court had not been concluded, nor the cause finally submitted to them, until the clock in the court-room showed ten minutes after twelve, midnight, on Saturday. The court took a recess without adjournment until two o'clock on Sunday morning, and then received the verdict and discharged the jury. The judgment was reversed for error. The same result attended the judgment in Pulling v. People, 8 Barb. 384, the New York statute being an exact copy of the Missouri statute. The cause in this case was submitted to the jury at two o'clock on Sunday morning; about three o'clock the same morning they rendered their verdict, when the court was adjourned till Monday, and judgment then pronounced. In Baxter v. The People, 8 Ill. 368, the jury, on a trial for murder, returned a verdict of guilty, on Sunday, against the accused, and the court pronounced judgment thereon on that day. The Supreme Court held that the verdict was properly received, but that the judgment upon it was absolutely null and void. The cause was remanded with a *procedendo* to the court below, to render the judgment upon the verdict of the jury. In Butler v. Kelsey, 15 Johns. 179, it was held that a writ of inquiry could not be executed on Sunday. It was said there by the court that this proceeding was not like the case of a trial on circuit, where a verdict was sometimes taken on Sunday morning, because the jury must otherwise be kept together during Sunday. Both this case and Houghtaling v. Osborn, *supra*, are cited with approval in Story v. Elliot, 8 Cow. 28, where it is held that an award being a judicial act is void, if made and published on Sunday.

The common-sense view of the subject, which a majority of the courts have taken, is well expressed in the case of Huidekoper v. Cotton, 3 Watts, 56. Here the jury were sworn on Thursday; the trial continued till Saturday after dark, when the jury retired to make up their verdict. They did not agree for some time, and the verdict was given in about five o'clock on Sunday morning, the judgment being rendered on it the next day. It was contended that the judgment was void on account of the verdict being delivered on Sunday. The court refused to disturb the verdict. "The objection," they say, "goes to a great length; if it is unlawful or sinful to deliver the verdict verbally after Sunday has commenced, it must be equally unlawful to write and seal it up to be delivered on Monday; nay, to deliberate upon and discuss it after Sunday had commenced. Now, whether it would be less sinful, in fact, and in its consequences, to keep a jury from Saturday night until Monday morning locked up without food, or to permit them to give a verdict, go home and attend religious worship, we leave to casuists to discuss. However strange it may seem, it is certainly true, that Christians for some centuries kept their courts open on Sundays; and this in opposition to their heathen neighbors, who abstained from holding court on days appropriated to certain religious ceremonies in honor of their deities, and who also had certain unlucky days. At length decrees of councils of the church, and of emperors and governments, forbade holding courts on Sunday; but they went farther, and included many other days; Lent and other fast days, Christmas, Easter and several days before and after. These were many of them established by the civil authority in England; but they were never part of the law of this state. Every denomination of Christians in our country has its own regulations for its own members; but we have no general ecclesiastical law, and our courts have no power in such matters, except what is expressly given by legislative enactments." In Rosser v. McCally, 9 Ind. 589, the jury, at twelve o'clock on Saturday night, reported to the court that they could not agree. The plaintiff then asked the court to instruct them whether a verdict on Sunday would be valid. The court refused, and simply said to the jury that they were sworn and should do their duty, and directed them to retire. It was held that there was no error, and that the verdict might have been returned and received on Sunday; but the judgment was reversed for the reason that the verdict was delivered to the judge on Sunday, at his house instead of in court; and in McCorkle v. The State, 14 Ind. 39, the court repeated its former ruling and expressed the opinion that the court might sit on Sunday to receive a verdict, and to receive any motion or order touching it. See also, on this subject, Chapman v. State, 5 Blackf. 111; Johnston v. People, 31 Ill. 469; Johnson v. Day, 17 Pick. 106; Nabors v. State, 6 Ala. 200; Van Riper v. Van Riper, 1 South. 159; Hiller v. English, 4 Strobh. 586; Cory v. Silcox, 4 Ind. 373; Webber v. Merrill, 34 N. H 202; True v. Plumley, 36 Ind. 466.

ELECTIONS—VACANCY—"DULY QUALIFIED."

STATE v. SEAY.

Supreme Court of Missouri, October Term, 1876.

HON. T. A. SHERWOOD, Chief Justice.
" W. B. NAPTON, }
" E. H. NORTON, }
" WARWICK HOUGH, } Judges.
" JOHN W. HENRY, }

1. VACANCY—WHEN SUCCESSFUL CANDIDATE IS DULY QUALIFIED.—In 1868 G was a candidate for judge of the ninth judicial circuit, and in January, 1869, claiming to have been elected, entered upon the duties of the office and continued to discharge them until the expiration of the term; in 1874 one M was duly elected to succeed G, received his commission and took the oath of office, but died before his term commenced; thereupon the governor issued a writ of election to fill the vacancy, and the respondent was elected and took possession of the office. *Held*, that G's successor having been duly elected and qualified, he could not hold over, and that the death of M created a vacancy which was legally filled by the election of the respondent.

2. RIGHT OF ONE NOT ENTITLED TO OFFICE TO ABANDON.—Whether one who wrongfully, and without being

elected thereto, enters upon the discharge of the duties of an office, and with the acquiescence of his constituents and the state authorities, can *abandon* such office before his successor is duly elected and qualified; *quære.*

3. WHETHER VACANCY EXISTS, A JUDICIAL QUESTION.—The provision of the constitution of this state that the governor, upon being satisfied that a vacancy exists, shall issue a writ of election, etc., confers no judicial authority. The question whether such vacancy, in fact, exists is still open to judicial investigation in the courts of the state.

C. M. Napton, for relator; *Lay & Belch* and *John W. Boothe*, for respondent.

HENRY, J., delivered the opinion of the court:

This is a proceeding by the state, through the attorney-general, to try the right of the defendant to the office of judge of the ninth judicial circuit. In November, 1868, D. Q. Gale and one Peter B. McCord were candidates for judge of the ninth judicial circuit. On the first Monday in Jannary, 1869, Gale entered upon the discharge of the duties of the office, and continued to discharge them until the expiration of the term of office, commencing on that day. In November, 1874, Peter B. McCord was duly elected to succeed Gale, receiving his commission from the governor, and in December, 1874, took and subscribed the oath of office. On the 2d day of January, 1875, before his term of office commenced, he departed this life. The governor issued a writ for an election to be held the 3d day of March, 1875, to fill the vacancy which, in his judgment, the death of McCord had occasioned, and respondent at that election received a majority of the votes cast, was commissioned, qualified and entered upon the discharge of the duties of the office. These are the facts which appear of record, and about which there is no controversy. The relator in his information alleges that said Gale, for his first term, was *duly elected*, commissioned and qualified.

The respondent, in his answer, denies that Gale was elected or commissioned, or that he took the oath of office; and alleges that he was an intruder and a usurper, and that his usurpation commenced on the first Monday of January, 1869, and continued to the first Monday of January, 1875. He admits that there was an election in November, 1868, and that Gale and McCord were candidates, but alleges that McCord was then duly elected. He also charges in his answer that, at the date of the writ of election, "a vacancy in fact existed, and that said Gale did not in fact perform, nor claim to perform, nor assume to perform, nor claim the right to perform the duties of said office; but, on the contrary, had wholly given up and abandoned said office, and had engaged in the practice of law, as an attorney-at-law, in the several circuit courts of the said ninth judicial circuit." To respondent's answer the relator filed a demurrer, and respondent contends that by the demurrer it is admitted that Gale usurped, and also, that at the date of the writ of election he had abandoned the office.

The facts alleged and relied upon in support of the allegation that Gale *was*, conclusively show that he was *not* a usurper. Those facts are, as alleged by defendant, that he entered upon the discharge of the duties of the office on the first Monday in January, 1869, without having been duly elected, commissioned or qualified, and for six years, the entire term, was the acting judge of that judicial circuit. An acquiescence for such a length of time in his claim to be judge of the circuit, and in his acting as such, by the people of that circuit, the attorney-general and his competitor McCord, made him a judge *de facto*, and precludes us, *in this case*, from declaring that he was an intruder and a usurper. With regard to the averment that Gale had abandoned the office, without determining whether there can be an abandonment of an office in this state, otherwise than by resignation, removal, or some other act which the statutes may provide shall vacate an office, we are satisfied that more particularity is required in pleading abandonment than has been observed by the respondent in this case.

A circuit judge can not abandon his office by saying he abandons it, or merely by neglecting to attend to his duties as judge. What amounts to abandonment of an office, if one can be vacated by abandonment otherwise than in the manner prescribed by the statute, is a question of law, and the special facts should be stated, in order that the court may determine whether those facts constitute an abandonment or not. In immediate connection with the averment of abandonment, it is alleged that "Gale engaged in the practice of his profession" in the counties composing the ninth judicial circuit. If this be stated as the fact relied upon by respondent to show an abandonment, it is not sufficient. A circuit judge may practice law, and, while by so doing he violates the law and subjects himself to indictment and impeachment, he does not vacate or abandon his office any more than any other conduct violative of his oath "faithfully to demean himself in his office" would vacate or amount to an abandonment of his office.

It is insisted by respondent that this court can not review the action of the governor in issuing a writ for a special election to fill a vacancy in office which he may determine has occurred, and bases his denial of the jurisdiction of the court on the 14th section of the 5th article of the constitution of 1865, which provides that "the governor shall, upon being satisfied that a vacancy exists, issue a writ of election to fill such vacancy." The division of the powers of the government into three distinct departments, each to be confided to a separate magistracy, is to be found in the state constitution of every state in the union, and in nearly, if not all of them, power is given the governor to fill vacancies which occur in office. The power to fill a vacancy implies the right of an officer to whom it is given to determine when a vacancy exists, if the right to determine that question is not bestowed elsewhere; and the 14th section confers no greater authority upon the governor in this respect, than is given him in the power conferred to fill a vacancy. If the power to fill a vacancy did not carry with it authority to determine when a vacancy exists, and that authority is not given to some person or tribunal, a vacancy could not be filled, and the section would be nugatory. Hence, that provision of the constitution that "the governor, upon being satisfied that a vacancy exists, shall issue a writ of election, etc.," confers no judicial authority, but merely for convenience authorizes him to determine that question, because the public service might suffer, if a vacancy could not be filled until after a judicial investigation be had. He determines it upon *ex parte* testimony, or information that is technically no testimony at all, and surely it was not intended that the rights of incumbents were to be conclusively determined by the governor, by the discharge of the duty imposed upon him by that section.

Nearly every authority cited in the briefs filed by the attorneys in this case, was one in which, on the relation of some officer or citizen, the act of a governor in filling a vacancy was reviewed by the court; and in nearly all of the state constitutions the provision conferring power upon the governor to fill a vacancy is substantially the same as that in our state constitution. In many of those cases it was determined that the acts of the governors were illegal, and, by the judgments of the courts, their appointees were ousted. The case of the State v. Lusk, 18 Mo., 333, was a case in which the jurisdiction of the court denied here was exercised.

The doctrine contended for by respondent would prostrate the other departments of the government and make the chief executive supreme over them. He would have but to declare a vacancy in every judicial circuit in the state to remove all the incumbents, and supply their places with men of his own choice. The doctrine so strenuously contended for by respondent is equally in conflict with reason and authority.

Having disposed of these preliminary questions, we come now to the main question in this case. Was there a vacancy in the office of judge of the ninth judicial circuit on the first Monday in January, 1875? If there was, the demurrer must be overruled and judgment rendered for defendant. In November, 1874, McCord was elected. In December following he received his commission, and took and subscribed the prescribed oath of office, and on the 2d day of January, two days before the term for which he was elected commenced, he departed this life. The constitution of 1865, article 6, section 14, provides that the circuit judges "shall be elected for the term of six years, but may continue in office until their successors shall be elected and qualified." The same section also provides that, "if any vacancy shall happen in the office of any circuit judge, by death, resignation, removal out of his circuit, or by any disqualification, the governor shall, upon being satisfied that a vacancy exists, issue a writ of election to fill such vacancy.

We are referred to the case of the State v. Lusk, 18 Mo., as an authority in support of the position that the death of McCord, before his term commenced, created no vacancy. On the 24th day of March, 1845, the general assembly passed an act establishing the office of public printer, and provided that "a public printer shall be elected at the present session of the general assembly, and at every regular session thereafter, by joint vote of the two houses;" that he should hold his office for two years, commencing on the first of May next thereafter, and until his successor should be elected and qualified; and that public printers thereafter elected should hold office for two years, and until their successors should be elected and qualified. The 6th section provided that, "if the public printer should die or resign, or if from any other cause the office should become vacant, the governor shall appoint a public printer, who shall give bond and qualify, and hold his office for the same time that the printer in whose stead he shall be appointed would have held." On the 4th day of February, 1851, James Lusk was duly elected public printer, and thereupon gave bond and qualified. The general assembly, which convened in December, 1852, failed to elect a successor, and in May, 1853, the governor appointed John G. Treadway. It was insisted that the failure of the general assembly to elect created a vacancy which the governor could fill by appointment; but this court in that case held otherwise.

In the case at bar there was an election. The successful candidate, McCord, received his commission and took the oath of office. The limit of Gale's term of office, fixed by the constitution, was six years from the first Monday in January, 1869, if a successor should be duly elected and qualified. His successor was duly elected and qualified. There was no one elected by the general assembly to succeed Lusk, and this makes a material and vital difference between the two cases, and without overruling that, we may, in this case, determine that there was a vacancy created by the death of McCord. The case of the Commonwealth v. Hanley; 9th Barr, 513, is, in many of its features, similar to this,, and is confidently relied upon by relator. Hanley was elected clerk of the orphans' court on the second Tuesday in October, 1845, for three years, from the first day of December, 1845, "and until a successor should be *duly qualified*." He qualified and entered upon the discharge of the duties of the office. On the second Tuesday in October, 1848, one Brooks was elected to succeed Hanley, but died on the 7th day of November following, within *thirty days from the day of election*, and by the law of that state he could not have qualified to fill the office by taking the necessary oath, or by giving bond within thirty days from the day of election. The opinion of the court was delivered by Rogers, J., and we quote from that opinion so much as we think bears upon the questions discussed in this case. "Was there a successor duly qualified within the spirit of the constitution? is the point on which the question mainly, if not entirely, depends. Being duly qualified, in the constitutional sense, and in the ordinary acceptation of the words, unquestionably means that the successor shall possess every qualification; that he shall in all respects comply with every requisite, before entering on the duties of the office; that, in addition to being elected by the qualified electors, he shall be commissioned by the governor, give bond as required by law, and that he shall be bound by oath or affirmation to support the constitution of the commonwealth, and to perform the duties of the office with fidelity. Until all these prerequisites are complied with by his successor, (for if you can dispense with one, you can dispense with all), the respondent is *de jure* as well as *de facto* the clerk of the orphans' court." The words are emphatic and full of meaning. The successor must not only be qualified, but duly qualified; and qualification for office, as defined by the most approved lexicographer, is "endowment, or accomplishment that fits for an office; having the legal requisites, endowed with qualities fit or suitable for the purpose." If McCord had died after his election, and before he received his commission and qualified, Commonwealth v. Hanley would be an authority direct to the point that his death created no vacancy, and we infer from the opinion of the court that, if in that case Brooks had duly qualified and died before the commencement of the term for which he was elected, the court would have held that his death created a vacancy. Here it is admitted that McCord was duly elected and commissioned, took and subscribed the prescribed oath, was thirty years of age, learned in the law, and resident in the ninth judicial circuit, and was therefore at his death duly qualified, as those words are expounded by the learned judge in Commonwealth v. Hanley. By the law of Pennsylvania, Brooks was not permitted to give his official bond, or take the oath of office within thirty days after his election; but by section 2, article 1, chapter 4, Wagner's Statutes, it is provided that "each judge or justice, shall, within thirty days after the receipt of his commission, and before entering upon the duties of his office, take the oath of loyalty prescribed by the constitution of the state, and that he will faithfully demean himself in office." So that the taking of the oath of office by McCord was not premature, but was in compliance with the law. There is such a conflict between the California cases which have been cited, that they are of but little authority on either side of the question. The earlier cases sustain defendant's view. They are, however, overruled in two cases, more recently decided, but by a divided court, the dissenting judges adhering to the doctrine of the former cases. We have been referred to cases in New York and elsewhere, in which are observations to the effect that an office can not be considered vacant, while there is an incumbent legally in office, and discharging the duties of the office; but this we do not controvert, and it only brings us back to the question, was there an incumbent of the office of judge of the ninth judicial circuit, when the governor issued

his writ of election? If there was, there was no vacancy, and those cases would be in point; but the very question we are discussing is, whether there was then an incumbent, and this turns on the meaning of the word *qualified*, as used in our constitution of 1865.

The case of the State v. Hopkins, 10 Ohio, S. T. 509, is so like the case we are considering, in its facts, and so directly sustains the position of the respondent on the main question in this case, that we feel inclined to state fully the facts of the case, and the opinion of the court so far as it bears upon that question. By the statute of that state the county commissioners were expressly authorized to appoint a county treasurer, whenever that office became vacant "by death, resignation, removal, neglect to give bond, or from any other cause." At the fall election of 1857 one Hopkins was re-elected county treasurer, and on the first Monday of June, 1858, having been duly qualified, entered upon his second term of office. At the regular election in the fall of 1859, Matthias Rapp was duly elected to succeed Hopkins. Afterwards, in 1859, the Governor issued to said Rapp a commission as county treasurer, which was transmitted to the county clerk. On the 27th day of November, 1859, before the commencement of his term, said Rapp deceased, having never in fact received his commission. On the first Monday of September, 1860, the day on which the term for which Rapp was elected commenced, the county commissioners appointed William Adams to fill the vacancy occasioned by the death of Rapp. Adams qualified, and Hopkins refused to yield possession of the office. The principal question in that case, as in this, was whether the death of the officer-elect, before his term of office commenced, occasioned a vacancy. The court in that case say: "By reason of the death of Matthias Rapp prior to the commencement of the term for which he had been elected, there was no person, on the first Monday of September, 1860, entitled to take and hold the office during the regular statutory term, commencing on that day. And this want of a regular incumbent for the term, occasioned by the death of a party who would otherwise have been such, constitutes, as we think, *a vacancy occasioned by death*, within the meaning of the statute. And were it necessary, we should hold that, under the statute last cited, the office became vacant upon the failure of Rapp to give bond, and take the oath of office. True, this failure was caused by the act of God, and not by the laches of the party; but its *effect* upon the *office* is the same, whatever may have been the cause. This construction makes the legislative intention accord with the constitutional policy by which no person is 'eligible to the office of county treasurer for more than four in any period of six years.'" The last paragraph of the opinion we quote, because it is urged that the court was controlled by this constitutional provision in its conclusion that there was a vacancy. The court, on the contrary, says with emphasis, that the *vacancy* was occasioned by death, and there is no intimation in the opinion that the constitutional provision, which is only incidentally referred to, in any manner influenced the conclusion which the court arrived at in that case. If the death of Rapp occasioned a vacancy in that, no one would contend that McCord's death did not occasion a vacancy in this case. Rapp had not received his commission, had not given his official bond, had not taken the oath of office, had done nothing but announce himself a candidate, and received a majority of the votes cast, while McCord had done all that was required of him by the law, and within the time prescribed by the statute.

The People v. Lord, 9 Mich. 22, is another case relied upon by relator, as expounding the meaning of the word *qualification*, in favor of the view taken by him. The constitution of Michigan, under which that case was determined, provides "that a judge of probate shall hold his office for four years, and until his successor is elected and qualified." In 1860, North, then in office, was re-elected as his own successor for the term commencing January 1st, 1861. He died 22d November, 1860. Van Valkenburg was appointed by the governor to fill the vacancy which, in his judgment, had occurred. On the 1st of January, 1861, under the impression that the time for which the first appointee, Van Valkenburg, was appointed, ended at the expiry of North's first term, the governor appointed Henry Lord for the next term. It will be observed that North died in November, 1860, before the commencement of his second term. It does not appear that, after his election, he was otherwise qualified under the law of that state. The case presents the same material difference from this case that we have noticed as distinguishing the case of the State v. Hopkins, 10 Ohio, and the Commonwealth v. Hanley, 9 Barr, from the case at bar. In the opinion of the court, in the People v. Lord, the court say: "His (Van Valkenburg's) term of office did not expire on the 1st of January, 1861, unless some one elected and qualified was then ready to take the office." We submit that the language of the court extends the term beyond the time fixed, by the express words of the Constitution of Pennsylvania. The constitutional limit was, "until a successor is elected and qualified," but the court add, "and ready to take the office." The construction of the word *qualified*, was not directly before the court. There had not been an election, and that, under the law of Michigan, was decisive of the question. There was no question about the qualification, or what amounted to qualification of one elected; for no one had been elected. We can not, therefore, regard it as a direct authority on the question; but if it were, we think that the weight of authority is against it. The law abhors vacancies in public offices, and great precautions are taken to guard against their occurrence. The policy of the law is to have some one always in place to discharge the duties of public offices; and, in a doubtful case, the construction of a law fixing the tenure of an office would be greatly influenced by that consideration; but where, as in this case, there is a *casus omissus*, resulting from giving the language of the law the only construction of which it is fairly susceptible, the courts must leave it to the law-making power to make provision to avoid such consequence.

By the term of the constitution, Gale's term was to cease when a successor should be elected and qualified. His successor, McCord, was duly elected and duly qualified; and when that occurred, Gale's right to hold over ceased, and the death of that successor before his term commenced did not revive a right in Gale, which ceased when McCord qualified.

The other judges concurring, the demurrer is overruled, and judgment for respondent, Seay.

NOTE.—The foregoing opinion is the first delivered by the successor of Judge Wagner. The conclusion reached is clearly right. Without having given the subject much thought, it seems to us that the first duty of one who wrongfully intrudes himself into an office is, to get out. Acquiescence in his usurpation by the people does not estop them to question his right to the office; notwithstanding such acquiescence, he may be at any time turned out and punished for the usurpation. He can not resign that to which he has no title. All he can legally do is to abandon his unlawful claim. M. A. L.

AN exchange claims that the oldest lawyer in the world is Hon. Elbert Herring who was born on the 8th of July, 1777, at Statford, Conn.; admitted to the bar in December, 1799, and made a judge in 1805. He was the first register in the state of New York.

CONSTITUTIONAL LAW—EMINENT DOMAIN —"MANUFACTURING PURPOSES."

RYERSON v. BROWN.

Supreme Court of Michigan, January Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, }
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }

1. CONDEMNATION OF LAND FOR MANUFACTURING PURPOSES.—It is not competent for the legislature to provide generally for the condemnation of the lands of non-consenting parties in order to obtain water-power for manufacturing purposes; the statute not undertaking to define the purposes except in this general way, and not making any provision under which the public will have rights as regards the manner in which the power shall be employed.

2. SPECIFICATION OF THE USE MUST BE PARTICULAR.—Property can not be appropriated to public use under the eminent domain act without a particular specification of the uses; and this specification must be made by the legislature itself; it can not be left to a jury to declare anything a public use which, in their view, will be of public benefit.

3. A STATUTE SPECIFYING "MANUFACTURING PURPOSES" as the public use, is not sufficiently specific.

COOLEY, C. J.:

The proceedings in this case were taken under "an act to revise and amend an act entitled 'an act to encourage the erection and support of water-power manufactories,' approved March 21st, 1865," the amendatory act having been approved April 30th, 1873. The second section of the act provides that "whenever any person shall desire to erect and maintain a water-power mill on his own land, or upon the land of another with his consent, or who has heretofore erected any such mill, or who shall desire to erect and maintain a dam on the same for the purpose of operating such mill by water-power, which dam flows or will flow water upon land belonging to any other person, he may obtain the right to flow such land upon the terms and conditions, and in the manner hereinafter set forth."

The third section provides for proceedings in the probate or circuit court of the county for the appointment of commissioners, after failure to agree with the owner of the land as to the amount of damages to be paid. These proceedings are instituted by petition which is required to "set forth the object and purpose of the petitioner, and that it is his intention in good faith to erect, construct and maintain, or to maintain, if already constructed, a dam for the purpose of operating a water-power mill, particularly describing such mill, and whether it is for the public use." It is also required to set forth a description of land flowed or to be flowed, and the names, residences, etc., of owners. The fourth and fifth sections provide for notice to parties, and for a hearing on the petition. The sixth section regulates the action of the commissioners and what their report shall contain, requiring them, among other things, to "ascertain and determine the necessity for taking and using any such real estate or property for the purpose set forth in the petition, and whether the same is for public use." The seventh section authorizes the summoning of a jury instead of commissioners, when the same is demanded by either party, and regulates the action and report of such jury. The eighth section provides for a hearing on the report, and the ninth makes the report, when confirmed, and when payment of the damages awarded is made, conclusive of the right to flow. Laws 1873, vol. 1, pp. 486, 495.

Legislation of this sort is new in this state. It is true that in 1834 an act was passed by the territorial council "for the support and regulation of mills," which purported to authorize any mill-owner to flow the lands of other persons by his mill-dam, on the payment of an annual compensation assessed as therein provided. Territorial Laws, vol. 3, p. 192. But these provisions were repealed within four years. Territorial Laws, vol. 3, p. 699. And if any proceedings were ever taken under them while they remained in force, no record remains thereof, so far as we know. Neither the statutes of 1838, nor those of 1846 contained any similar provision, though grist-mills were regulated by both. Though in terms the act of 1824 was not expressly restricted to mills for the grinding of grain, it is probable that mills of that description were alone contemplated by the council in passing it, as mills for other purposes are generally designated more specifically. The repeal of the act of 1824, and the neglect for more than forty years to pass any other act of like character, afford weighty evidence that whatever necessity might have been supposed to exist for such regulation in very early days, had wholly passed away in a very brief period. Nothing has occurred recently to create any necessity which has not existed at every moment since the act of 1824 was repealed. Indeed, the tendency of improvement has been in the direction of a steady diminution in the demand for water as a motive power for machinery. The adoption of the act of 1865 was not preceded by public discussions presenting its necessity, as would naturally have been expected when so great a change in the policy of the law was to be inaugurated, and the inference is admissible, if not forcible, that, like many general laws incautiously adopted, it had in view some local or individual necessity, rather than any necessity which then was, or was afterwards, expected to become general. Unlike the act of 1824, the act of 1865 clearly appears to contemplate other mills than those for the grinding of grain. The title of the act would indicate a purpose to give every species of manufacture, which could profitably be carried on by means of water-power, the benefit of its provisions. In McClary v. Hartwell, 25 Mich. 139, in which proceedings under that act were in question, the purpose to be aided was a machine-shop and foundry. It is true that the act, following the constitution in that particular, requires a finding by the jury or by commissioners, that the proposed use is a "public use;" but the fact remains, that they are at liberty to find any use of water-power for the purposes of manufacture to be a public use, if in their opinion it will be beneficial. In this particular the statute is an anomaly, at least in the legislation of this state.

Statutes permitting the lands to be thus taken for the purposes of water-power have been passed in some other states, and have been enforced. In Massachusetts they have received considerable attention, and been sustained largely in reliance upon a general state policy evidenced by a long series of legislative enactments. See Wolcott Woolen Manuf. Co. v. Upham, 5 Pick. 294; Boston, etc., Mill Corp. v. Newman, 12 Pick. 467; Hazen v. Essex Co., 12 Cush. 477. In Maine the like considerations have supported them. Jordan v. Woodward, 40 Me. 317. In New Hampshire the whole subject was very carefully considered in the case of Great Falls Manuf. Co. v. Fernald, 47 N. H. 444, and the taking of land for mill-dam purposes was justified on the ground that statutes existed for the purpose when the constitution was adopted, and it was reasonable to construe that instrument as permitting them. See also Ash v. Cummins, 50 N. H. 591. In Tennessee, Indiana, Connecticut and Kansas, such statutes have been considered sustainable on principle. Harding v. Goodlett, 3 Yerg. 41; Hankins v. Lawrence, 8 Black. 266; Olm-

stead v. Camp, 33 Conn. 532; Venard v. Cross, 8 Kan. 248; Harding v. Funk, *Id.* 315. In Wisconsin they have been sustained. Newcomb v. Smith, 1 Chand. 71; Thien v. Voegtlander, 3 Wis. 461; Pratt v. Brown, *Id.* 603. But it has since been declared that, if the question were new, and the court not embarrassed by previous decisions, a different conclusion would doubtless be reached. Fisher v. Horicon Iron and Manuf. Co., 10 Wis. 351, 353. In Georgia such statutes have been declared to be beyond the constitutional power of the legislature. Loughbridge v. Harris, 42 Ga. 500. An eminent judge in New York has expressed a like opinion. See Hay v. Cohoes Co., 3 Barb. 47. A like view has been taken in Alabama, though it was assumed in the case that mills which were to grind grain for toll, and were required to serve the public impartially, might be aided by such statutes. Sadler v. Langham, 34 Ala. 311. In Tyler v. Beacher, 44 Vt. 648, it was held that the taking of lands for mill-dams was not a taking for a public use, at least where the mills were not compelled by law to render service for the public under impartial regulations.

An examination of the adjudged cases will show that the courts, in looking about for the public use that was to be accommodated by the statutes, have sometimes attached considerable importance to the fact that the general improvement of mill-sites, as property possessing great value if improved, and often really worthless if not improved, would largely conduce to the prosperity of the state. This is especially true of the decisions in those states where water-power is most abundant, and where, partly because of a somewhat sterile soil, manufactures have attracted a larger proportion, than in other states, of the capital, skill and labor of the community. In this state it is doubtful if such legislation would add at all to the aggregate of property. Numerous fine mill-sites in the populous counties of the state still remain unimproved, not because of any difficulty in obtaining the necessary permission to flow, but because the power is not in demand. If the power were needed, the land would generally be obtained on reasonable terms, except, perhaps, where there was ground to believe that a dam would become a nuisance; and in such cases no permission to take lands, and no condemnation for mill purposes, could protect the parties maintaining a dam against prosecution for the public grievance.

Whether the use to which the machinery is to be put, which is to be operated by the power, can be declared a public use, is the question that remains to be considered. If the act were limited in its scope to manufactures which are of local necessity, as grist-mills are in a new country not yet penetrated by railroads, the question would be somewhat different from what it is now. But even in such case it would be essential that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations. A flouring-mill in this state may grind exclusively the wheat of Wisconsin, and sell the product exclusively in Europe; and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbor to sell a business site to him, any more than could the manufacturer of shoes or the retailer of groceries. Indeed, the two last-named would have far higher claims; for they would subserve actual needs, while the former would at most only incidentally benefit the locality by furnishing employment and adding to the local trade. There is nothing in the present legislation to indicate that the power obtained under it is to be employed directly for the public use. Any sort of manufacture may be set up under it, and the proprietor is not obligated in any manner to carry it on for the benefit of the locality, or of the state at large. He is not bound to consider the interest of the locality or of the state; and nothing but the requirement that his project, whatever it is, shall receive from a commission or a jury a certificate to its public character, would preclude his devoting the power to purposes which public opinion would not sanction. The statute appears to have been drawn with studious care to avoid any requirement that the person availing himself of its provisions shall consult any interest except his own, and it therefore seems perfectly manifest that, when a public use is spoken of in this statute, nothing further is intended than that the use shall be one that, in the opinion of the commission or jury, will in some manner advance the public interest. But, incidentally, every lawful business does this.

We are not prepared to say that incidental benefits to the public could not, under any circumstances, justify an exercise of the right of eminent domain. The rules which underlie taxation do not necessarily govern the case. Taxation is for those purposes which, properly and legitimately, are designated public purposes; but the authority of the state to compel the sale of individual property for the use of enterprises in which the interest of the public is only to be subserved through conveniences supplied by private corporations or individuals, has been too long recognized to be questioned. In such cases the property is not so much appropriated to the public use, as taken to subserve some general and important public policy; and the difference between a forced sale for a reasonable compensation paid, and a forced exaction without any pecuniary return, is amply sufficient to justify more liberal rules in the former case than in the latter. If, however, the use to which the property is to be devoted were one which would justify an exercise of the power, it would still be imperative that a necessity should exist for its exercise. All the authorities require that there should be a necessity for the appropriation in order to supply some public want, or to advance some public policy; the object to be accomplished must be one which otherwise is impracticable. What, then, is the necessity for the exercise of this extraordinary power in aid of manufacturing corporations? It is certainly not a necessity of the extreme sort which supports the like authority in aid of railways. A railway can not run around unreasonable land owners; but no one man, and no number of men, can prevent the establishment of a machine-shop or a saw-mill by refusing to part with the lands they may happen to own. No particular motive power is indispensable. At the worst, the question presented in any case will be a question of different degrees of convenience, or of probable profits. A mill at one spot on a stream may be more profitable than at another; a machine-shop at one point may be more cheaply operated by water-power than by steam-power; but steam is not excluded from any part of the state because of any general conviction that water-power is more advantageous or more economical. When the owner of a mill-site enters upon the calculation whether he shall improve the site in order to obtain operating power for machinery, or, on the other hand, provide steam machinery, the question that confronts him is not one of necessity, but of comparative cost, expense of operation, and probable returns. Each course would have its advantages, and different minds would disagree concerning the choice to be made.

In considering whether any public policy is to be subserved by such statutes, it is important to consider the subject from the standpoint of each of the parties. What may be convenience and economy for the mill-owner, may be inconvenience and loss to his neighbor. Presumptively, it always subjects a land-owner to

inconvenience when his land is taken against his will. It is reasonable to infer that he would part with it for a fair price, if he were not to be subjected to annoyance or inconvenience in consequence. It is true he may unreasonably refuse to part with his land, and, possibly, motives of hostility and malice may induce him to put obstacles in the way of a proper enterprise. But, on the other hand, the opportunities for unreasonable or malicious action are not exclusively on one side. A mill-dam is not always an agreeable or wholesome neighbor; it sometimes brings blight to a neighborhood, and discomfort and sickness to the people. The fear of such consequences might be the controlling motive in refusing consent to the flowing of lands; and the power to make compulsory appropriation, if admitted, might be exercised under circumstances when the general voice of the people immediately concerned would condemn it, though a jury drawn from the county at large might fulfill the technical requirement of the law by finding that the use for the proposed manufacture would be a "public use." It is natural to assume that any new manufacturing establishment will be advantageous in the community, and, in a general sense, if there were no drawbacks, this would be true; but the drawbacks are often so serious that it becomes a public nuisance. It would be a singular, but by no means impossible, result of the condemnation of lands for a mill-dam, to find the dam itself condemned and ordered removed as a nuisance. That mill-dams often are nuisances is not only well known, but the prosecutions for such nuisances make the fact a familiar one in our jurisprudence. Where the country is level, as is the case with a considerable part of this state, the danger that they will become nuisances is particularly great. And it is as fair to assume that the owner of a mill-site may be unreasonable and exclusively selfish in insisting upon an appropriation, as that the owner of the lands desired will be unreasonable and exclusively selfish in refusing to sell. But, whether the one or the other is likely to be most unreasonable, is not a consideration that can be conclusive. What seems conclusive to our minds is the fact, that the questions involved are questions, not of necessity, but of profit and relative convenience. It will scarcely be claimed that any single branch of industry is dependent, for either its establishment or support, upon the appropriation of property against the will of the owner, in order to obtain water-power.

Undoubtedly, there may arise circumstances under which it would be convenient if a power to condemn lands for mill purposes might be exercised; but they are so rare that a stretch of governmental power, in order to provide for them, would be more harmful than beneficial. It would, under any circumstances, be pushing the authority of government to extreme limits, and, unless the reasons for it were imperative, would be likely to lead to abuses rather than tend to the promotion of the general interest, and to breed discord where, in the absence of such legislation, moderate counsels and final agreement might have prevailed. If, in individual instances, obstacles are encountered in the unreasonable objections of individual land-owners, the rare instance can not justify a general law which would be likely to breed as many grievances as it would cure; for legislation of this sort is always grievous when no great necessity justifies it; and it is always an invasion of liberty and of right, when one is compelled to part with his possessions on grounds which are only colorable. A person may be very unreasonable in insisting on retaining his lands; but half the value of free institutions consists in the fact that they protect every man in doing what he shall choose, without the liability to being called to account for his reasons or motives, so long as he is doing only that which he has a right to do.

For these reasons we think this statute without warrant, and that the proceedings under it can not be supported. They will therefore be set aside, with costs of all the courts.

CAMPBELL, J. (Marston, J., concurring):

I agree with the Chief Justice in the conclusion that the statute providing for flowage is not a valid enactment. Assuming that there are cases in which water-power manufactories may be put under obligations of such a general character, as in one sense to be of a somewhat public nature, this statute has not undertaken to declare what uses are thus to be regarded, and has left it to the mill-owners to assert, and to the commissioners to find any use to be public which they choose to regard as such. Under our constitution the necessity of taking the property for public purposes must be found in each case by the jury or commissioners who appraise the damages; but this does not delegate to them the discretion of declaring what sorts of purposes are lawful. The legislature must indicate what sort of possible public purposes they are willing to have submitted to the process of an involuntary taking. Whether the particular improvement is so necessary as to justify the condemnation of lands, is then a question for the appraising body. But neither legislature nor jury can proceed to assert this compulsion, even for purposes unquestionably deserving favor, unless necessary. And this necessity is not confined to the particular work in question. It may be impossible to erect a water-mill on a given location, without condemning lands above it; but whether the public interests will suffer so much from not having it there as to justify the condemnation of lands to aid it, is a much more serious question.

The general sense, at the present time, is that mills are not within the scope of the jurisdiction to condemn private property in their favor. If cases arise in which such a jurisdiction would be proper, it is so exceptional, according to the general opinion, as to need support on very special grounds. And the question is fairly presented, whether under the constitutional authority of this state such legislation as the present is contemplated as proper. It is a principle which no respectable authority has ventured to deny, that property can never be condemned for private improvements, except where they belong to a class that can not usually exist without the exercise of that power, and where the public welfare requires that they shall be encouraged. The improvements which unite both these conditions have been found in practice to be very few, and to be confined generally to some of the various kinds of roads or ways by land or by water. In this state where lands are otherwise without beneficial access, this power, under the constitution, expressly covers private ways also upon the simple principle that property which can not be used as such is deprived of all its valuable attributes. There can be no doubt of the importance of mills for grinding and for sawing, to enable any civilized community to prosper, and as little doubt of the impropriety of making them public property, or building them at public cost. They are as necessary as roads and bridges, and if they could not be put in operation, as a general thing, without condemning lands for flowage, then the propriety of authorizing this might have been recognized. It is easy to see that there may be, in some times and places, as there have been, instances calling for such authority, and justifying it. Such was once the case in Michigan; but the history of that legislation is very conclusive in showing the understanding of our people when the present constitution was adopted.

In 1824 an act was passed by the territorial legislature "for the support and regulation of mills," with the following preamble: "Whereas the erection and support of mills to accommodate the inhabitants of the several parts of the territory ought not to be discouraged by many doubts and disputes, and some special provisions are found necessary relative to flowing adjacent lands, and relative to mills held by several proprietors; therefore be it enacted," etc. The statute then proceeds to authorize steps to use lands in all cases where necessary to raise water to a suitable head for any mill whatever; and the parties damaged were compelled to become moving plaintiffs, and required to have their damages assessed by an inquest made once or oftener as they should choose. This law was repealed in 1828. From that time up to 1850 very many special acts were passed authorizing particular dams to be made and prescribing such locks, sluiceways, or other conveniences as might prevent obstructions to the use of the streams for other purposes. Among all these there were only two which provided for any flowing without the consent of land-owners. Those two were passed in 1834 and 1835, concerning certain dams on Fox and Manitoowoc rivers, in what is now Wisconsin. L. 1834, p. 32; L. 1835, p. 55. The state of Michigan never gave any authority to flow lands without consent, until it was attempted, in 1865, by the law superseded by that of 1873 now in controversy.

The original enactment, as well as the repeal of the law of 1824, can be readily understood when considered in the light of the condition of the times of which we must take judicial notice. The territory was then in a state of almost complete isolation. Until the Erie Canal was completed, the expense of bringing steam machinery so great a distance would have been ruinous, and in the condition of the local roads it would have been impracticable. Emigrants were coming in rapidly, and mills were necessary for their existence. Towns could not be maintained, or even built without them. Water-mills were the only ones of any utility in such communities, and their necessity was urgent. They were undoubtedly as indispensable as roads, and in fact very commonly preceded them. The judgment of the legislature was in complete accordance with the facts. The condition of the then remote region of Wisconsin was not entirely different. The fact that the two statutes referring to that country differ so completely from all the rest adopted at the same time, is of itself evidence that there was some peculiar exigency which called for them. It is also to be remarked that the right to build dams on the Fox and Manitoowoc rivers was not in either case the sole purpose of the statutes, which seem to have contemplated them as but part of a system of improvements for the benefits of navigation and the establishment of business at the places named. The dams were only subsidiary.

The declaration of necessity in 1824 was no more significant than the finding that no further necessity existed in 1828, and this was no doubt owing to the introduction of steam. Any stream which is capable of furnishing water-power is still more capable of furnishing water for running steam-machinery, and any one who has the right to use running water at his steam-mills is independent of riparian owners above him. Inability to get a right of flowage by means of a dam may destroy the value of land for a water-mill, but does not even diminish it for any other purpose; and the community can not only get adequate milling facilities without it, but the location of mills can be made much more conveniently than where they could only be placed at certain points on the streams which were not always adapted for towns or easy of access.

When the constitution of 1850 was adopted, there had been, for more than twenty years, a consistent series of legislative declarations that no compulsory flowage was necessary. Such was the universally received doctrine in this state, and any statute to the contrary would have been questioned. In considering the uses which are to be subserved by various improvements, we must regard their public character referred to in the constitution, as it had been practically settled. There is no public necessity for accomplishing unnecessary results. The increase of settlements, and the improvements in machinery, are constantly diminishing the old difficulties instead of increasing them. The choice between steam and water power is now one purely of private economy. The public can be supplied adequately, at all events, and the occasional refusal of individuals to sell the right of flowage can not drive any community into distress. Any ruling which would now uphold the enforced servitude of private property to water-mills, would be in direct opposition to what was evidently meant when the constitution was adopted.

BOOK NOTICES.

PRACTICE, PLEADING AND EVIDENCE, in the Courts of the State of California, in General Civil Suits and Proceedings: Being the Code of Civil Procedure of California, as amended up to the close of the twenty-first session of the legislature (1876): with full cross-references, and annotations from the Reports of the various Courts in the United States; and adapted to all States that practice under a Code. By E. F. BUTTEMER HARSTON, of the San Francisco Bar. San Francisco: A. L. Bancroft and Co. 1877.

The Codes of California came into force on the first of January, 1873. The last edition of an annotated practice act appeared in 1868, and consequently the present work will, we are sure, be heartily welcomed by the profession of the Pacific Coast. The author claims to have taken the Code of Civil Procedure, as it now stands, as a basis, and to have embodied the results of an entirely independent perusal and study of the codes and other laws, and of the reports of the decisions of the courts of California, and other states. In addition, notes containing the practice in divorce, on habeas corpus proceedings, etc., and the rules of the supreme court, with notes of the decisions thereon, and the law relating to, and rules of, the San Francisco justices' courts, have been inserted. The arrangement is somewhat similar to that of "Wait's New York Annotated Code," but with references to and quotations from the other codes, cross references and a great variety of headnotes or "catch-words." The work contains over seven hundred pages, and is divided into four parts, entitled Courts of Justice, Civil Actions, Special Proceedings and Evidence. The first part embraces twenty-two chapters, under five titles, viz: Organization, jurisdiction and terms of courts; judicial officers; persons specially invested with powers of a judicial nature; ministerial officers and persons specially invested with ministerial powers. The remaining parts are equally full; the entire volume evincing great labor and study in its preparation.

WAIT'S ACTIONS AND DEFENSES. By WILLIAM WAIT. Albany: William Gould & Son. 1877.

This is the first volume of a work of a very comprehensive scope. The purpose of the author is to present the general principles of the law, both legal and equitable, particularly in relation to their application to Actions and Defenses, both at law and in equity, equally adapted to the Code System, and in which the titles are arranged in alphabetical order. After a brief general description of Rights and Remedies, of the general

principles of Contracts and of Torts in Suits in Equity, the author commences with the title of Accident, as viewed in a court of law and in a court of equity (in which, by the way, the leading principles are concisely stated and the leading adjudications, English and American, collected); and this is followed by chapters on Accounting, Adultery, Advancement, Agency, Ancient Lights, Animals, Annuities, Application of Purchase-Money, Assault and Battery, Assets—Administration of, Assignments, Assumpsit, Attorneys, Auctioneers, Audita Querela, Bailments, Banks and Banking, Bills of Lading, Bills and Notes, Bills of Peace, Quia Timet, To Remove Clouds on Title, Bonds, Boundaries, Breach of Marriage Promise, Bridges and Canals. The scheme of the work contemplates several additional volumes to complete, though each is complete in itself, and separately indexed.

The work, though useful to students, is designed for the active practitioner, and is intended to cover the whole domain of practical law. It has been prepared upon the theory that what the lawyer wants and needs in his daily practice is a work which contains nearly every important title in the law, in which the leading principles pertaining to it are stated and arranged and supported, and illustrated by reliable authorities. In this view, and especially to the practitioner who is not equipped with a full library, the work is, in a sense, a substitute, and justifies the statement of the author in his preface, that "it furnishes the young lawyer with a working library." This is sufficient to indicate the general character of Mr. Wait's present work, and we believe it is one which will be found useful to all classes of professional men, but chiefly to those who have not a full library of text-books, digests and reports. Mr. Wait's experience and care and great industry are well known from his previous productions. D.

SELECTIONS.

PAYING THE LAWYERS.—It is frequently asserted that one of the results of the panic and of the protracted hard times has been a marked reduction in the price of all commodities, the necessaries and luxuries of life having alike experienced the effects of the poverty and enforced economy of the people of this country. It is true that the price of whiskey has not perceptibly weakened, that a fifty-cent book is still sold for $2, and that a twenty-five-cent package of tobacco is no larger than of yore; true, also, that flour and bread, and meat and coal, and vegetables and milk, tea, sugar and coffee are still sold at the old rates; but, with these trifling exceptions (and some others), the cost of all commodities, needs and services has shrunk so much that it is asserted that, with economy and self-denial, a man may live on one-third less than it cost him during the flush times after the war.

There is one commodity, however, which seems to reverse the general law of poverty, and to rise only the higher on the waves of adversity, and this is the fees demanded by the members of the bar for their valuable services in cases where the fees are paid out of the pockets of the people. Of course, we have nothing to do with the fees paid by individuals for the conduct of their private litigation, if they are paid voluntarily; but in cases where the fees are fixed by order of a court, in cases where estates and minor heirs are victimized, and especially in cases where a city, county, state, or other public corporation is plaintiff or defendant, it has grown to be the custom for the lawyer to estimate his fee, not according to the work required, nor according to the service rendered, but rather according to the rule of the three-card-monte man, who always leaves his victim enough to get his supper with.

We published, the other day, the story of an estate in New York, valued at over a hundred thousand dollars, which was wholly swallowed up in the fees of legal sharks who obtained a warrant of the court to prey on it. Our readers are, doubtless, all familiar with the famous case in this county in which a young attorney obtained a contract for some $50,000 for something less than a month's work. A week or so ago three members of the St. Louis bar succeeded in convincing the county court that they ought to receive $1,000 apiece as a retainer in a case which will not interfere with their ordinary practice, their fee in the case doubtless being provided for after the manner of Dodson & Fogg, "on spec." For being an *amicus curiæ* the charge is $1,500, and we presume that a lawyer, who was called in as a referee to decide whether $1,500 was an excessive fee for an *amicus curiæ*, would never dream of taking less than that amount for expressing his opinion.

After we have paid these bills, the amusing part of the performance comes in, in the reflection that nearly all of the lawyers who get fat fees from official politicians (paid out of the sweat and toil of every worker in the community) are themselves politicians, and, when not engaged in pleading before the courts, are never weary of economizing and saving public money by cutting down the salaries of those who work all the year round. A Congress of lawyers has been for some time trying to prove that the chief magistrate of this country ought not to get more than $25,000 a year though no lawyer would think that any one of the counsel in the electoral arbitration would be overpaid, if he should receive that amount for giving his attention to the electoral question for a week or two. The lawyer who accepts $1,000 as a retainer, places in the charter of the city a provision that no municipal officer whatever shall receive more than $5,000 for his whole year's labor, and that he shall earn this by remaining in his office from 8 a. m. to 5 p. m.

There is no other country in the world, and no other profession, in which such absurd and preposterous demands prevail. If an engineer should demand a fee of $50,000 for building a $700,000 bridge, he would be laughed at; if a doctor should demand a percentage of the millionaire's wealth for saving his life, he would be hooted out of the profession. A great outcry is made whenever an able, learned and devoted divine receives a salary of $5,000 a year, and a railroad president becomes at once a money king and a monopolist on a salary of $10,000. In England the late Queen's Counsel, Hawkins, now promoted to the bench, was reported to make $60,000 a year by his practice, which was looked on as something fabulous; and in France the famous lawyers, who are kept busy all the year round and employed from one end of the country to the other, never aspire to a larger emolument. As we have said, it is no public concern what fees are paid in private litigation; but at a time when every relief from taxation is so eagerly sought, we have a right to demand that these outrageous and inexcusable extortions shall cease, and that the judges who have sanctioned them, the officials who have awarded them, and the distinguished lawyers who have pocketed them, shall be brought up very sharply before the bar of public opinion, and straightway restrained within the limits of reason.—[*St. Louis Globe-Democrat.*

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

October Term, 1876.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

TRUSTS AND TRUSTEES—WHEN EQUITABLE FOLLOWS LEGAL ESTATE—FRAUDULENT TRANSFERS—PARTIES IN PARI DELICTO—EVIDENCE.—When stocks are transferred by one person to another, in the absence of any evidence tending to prove that such stocks were assigned in trust, for the benefit of others, such a trust will not be presumed; but it will be presumed that the equitable follows the legal title. "A transfer, either of real or personal property, made with a view to defraud the creditors of the grantor, although the grantee has participated in this intent, is good between the parties and void as against creditors only, or, to speak accurately, is voidable by creditors at their election." [Quoting from Harvey v. Varney, 98 Mass. 120.] A conveyance can not be impeached by the administrator or by the heirs. [Citing McLaughlin v. McLaughlin, 16 Mo. 242; George v. Williamson, 26 Mo. 190; Merry v.

Fremon, 44 Mo. 518.] Appellants apply to a court of equity for affirmative relief in the establishment of a trust in favor of plaintiffs, as against defendant, Lyle, in relation to stocks originally assigned to defraud creditors. *Held*, no error to exclude evidence of conversations held by alleged trustee some months after the transfer of the stock. Nor in excluding a release, by alleged *cestuis que trust* of certain notes given for the stock, when the same was delivered to alleged trustee. Plaintiff not having established the trust, is not entitled to relief asked. Judgment affirmed. Opinion by Hayden, J.—*Crawford et al v. Lyle.*

RULES OF COURT—FRAMED ISSUES—SEPARATE ESTATE OF FEME SOLE—CONTRACTS OF MARRIED WOMAN—LEASE—SEALS.—When the rules of circuit court require framed issues for submission to the jury in chancery cases, to be presented to the judge two days before the trial, it is not error for the court to refuse to submit issues of fact to a jury in a case where this is not done. The courts *may*, in certain cases, submit such issues to a jury; but it is a mistake to suppose that they *must* do so. In reference to her separate estate, a married woman is treated as a *feme sole*, and the making of a written contract by her raises the presumption that she intended to bind such estate. A contrary intention must appear by the instrument itself, and can not be shown by parol. [Citing Met. Bk., St. Louis v. Taylor, 62 Mo. 338.] A lease need not be under seal; and when there is a seal, it may be treated as surplusage. Parol authority or ratification is sufficient for the execution of a lease by an agent. [Citing Shuetze v. Bailey, 40 Mo. 75.] A deed to a married woman, in which the *habendum* clause is "to her, for her sole and separate use, benefit and behoof, separate and apart from her said husband, and for her heirs and assigns forever, with powers by her deed duly executed and joined in by her said husband to encumber, sell," etc., gives her complete power of disposition, with or without her husband joining. [Citing Kimm v. Weippert, 46 Mo. 535.] Judgment affirmed. Opinion by BAKEWELL, J.—*Gay v. Ihm.*

TRUSTEE IN DEED OF TRUST—SUBSTITUTION OF SHERIFF—DISCRETION OF COURT—CONSTRUCTION OF STATUTE—WAG. ST., P. 1347, § 1.—Upon affidavit filed and proofs adduced under § 1 of the act relating to trusts and trustees, (Wag. St., p. 1347), the circuit court made an order substituting the sheriff as trustee in a certain deed of trust in lieu of appellant, who had refused to act. Motion filed by the trustee so removed to set aside the order, denying his refusal, but that disputes had arisen in regard to the validity of the deed; that before he had learned of the substitution, he had filed a petition in court, asking directions in the execution of the trust, which matter was still pending; that no notice had been given appellant of intended substitution. Upon hearing the motion to set aside the order, the same was overruled, and appeal taken to this court. The question as to whether this is an order from which appeal will lie, is not raised, but question submitted on its merits. *Held* that, conceding the facts to be as stated by appellant in his petition, it was not the duty of the court below to pass upon any such matters. The statute does not contemplate a trial as to equities in a proceeding for substitution, and no notice is requisite, as no substantial rights are to be adjudicated. There is no duty imposed upon a trustee in a deed of trust to intervene in such a proceeding; and if he does so, he can not call upon the court to settle equities between the parties beneficially interested. The law has provided ample remedies for the preservation of their rights. He is a trustee of a naked trust, and may be removed at the discretion of the court, in the exercise of its equity powers, and, except in case of gross abuse of power, its action is not the subject of review. [Citing Ex Parte Knust, 1 Bailey S. C. Ch. 489; Rowley v. Van Benthuysen, 16 Wend. 369; Howard v. Waters, 19 Md. 529.] Judgment affirmed. Opinion by HAYDEN, J.—*In the matter of Chamberlain.*

IN a late case, Edington v. Mutual Life Ins. Co., New York Court of Appeals (Nov. 14, 1876), it is held that under the statute of that state, forbidding a physician from disclosing any information he may receive necessary to enable him to prescribe for a patient; the evidence of several physicians, including defendant's medical examiner, who had attended the insured professionally, and which was offered to prove that he had numerous diseases, their information in regard to which being obtained while in attendance upon the insured, was properly excluded.

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1876.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Associate Justices.

REQUISITES OF RECORD IN CRIMINAL CASES.—In criminal cases the record must show that there was an arraignment of the defendant and a plea to the indictment before the jury was sworn, or the judgment will be reversed; and the omission of the arraignment and plea can not be cured by a subsequent arraignment and plea, and a *nunc pro tunc* entry of the fact, after the jury has been sworn.—*State v. Montgomery.*

PLEA IN ABATEMENT—SECOND INDICTMENT.—Where a plea in abatement to an indictment avers in direct and positive terms that the indictment on which defendant is tried is a first indictment, and that a second indictment has been found for the same matter charged in the first, it is error to overrule the plea, and the judgment of conviction thereon must be reversed. The first indictment is suspended by the second, and should be quashed.—*State v. Cheek.*

COMMON CARRIERS.—When goods intrusted to a railroad company (as fruit trees) are frozen and injured by unnecessary delay on the part of the carrier in transporting and delivering them, the owner is entitled to recover the value thereof. Testimony of a witness in regard to the trees, that "if they had been shipped that evening, as promised by the agent, they would have gone through all right," is not a mere opinion of the witness, but is the statement of a fact.—*Vail v. Pacific Railroad.*

INSTRUCTIONS WHICH ARE CONTRADICTORY OF EACH OTHER, OR OF THE RECORD, GROUND FOR REVERSAL.—When the instructions given by the circuit court are manifestly contradictory, or antagonistic, the judgment will be reversed. Where the record states that the parties offered evidence tending to sustain their respective sides of the issues made, and one of the issues was whether there was an agreement to give bond, an instruction that "there is no evidence that the bond was mentioned," is a good ground for reversing the judgment.—*Boynton v. Miller.*

LANDLORD AND TENANT—ACTION FOR RENT AND FOR POSSESSION—JURISDICTION.—The complaint set forth a leasing of mineral lands, the rent reserved being one-fourth of the mineral taken out; 32,000 pounds of mineral were taken out, one-fourth of which belonged to plaintiff, and none was paid over. *Held*, that this was a sufficient statement of "the exact amount of rent due"; and, that plaintiff's case was improperly dismissed in the circuit court on the ground that the amount demanded exceeded the justice's jurisdiction, as there was no proof offered of the value of the 8,000 pounds of mineral claimed by plaintiff as rent.—*Cook v. Decker.*

STATUTE OF LIMITATIONS—DEED TO VOLUNTARY ASSOCIATION.—In computing the ten years, which are a bar to real actions under our statute of limitations, four years must be deducted from the actual time, in the case of one who was a resident of the state of Arkansas during the war; and where the bar of twenty-four years is set up, the title of the owner draws with it the legal possession, if the land remains unoccupied, and there need be no entry of the owner, and no formal assertion of title, while the land remains unoccupied. A deed to a voluntary association of persons (who have never been incorporated), or to the "board of directors" of such an association, passes no title, and such a deed does not constitute an outstanding title. Opinion by NAPTON, J.—*Douthell v. Stinson.*

SHERIFF—ACTION FOR FALSE RETURN—DEFENSE NOT PLEADED NOT ADMISSIBLE.—In an action against a sheriff for false return, and for releasing property taken in execution, defendant answered that the property levied upon belonged to "a person other than the defendant in the execution"—the execution-debtor's wife. On the trial it was proved that all of the property of both the defendant in execution and his wife was worth less than $150, and judgment was rendered for defendant on the ground that the

property levied on and released was exempt from execution. The judgment is reversed because, to make this defense available, it must have been set up in the answer, and made an issue in the pleadings.—*Kiskaddon v. Jones.*

COUNTY WARRANTS—STATUTE OF LIMITATIONS.— The treasurer of Barton county applied for a *mandamus* to compel the justices of the county court to await and allow on his settlement certain county warrants which the collector had received for taxes of the holder and paid over to the treasurer. Defendant answered that the warrants were more than ten years old when the collector took them for taxes, and were barred by the statute of limitations. *Held*, that the taking up of the warrants by the collector for taxes, and the handing of them over to the treasurer, was a *payment* of the warrants; that, under the statutes of this state, the collector and treasurer had no power to refuse to take the warrants for taxes, and that the *mandamus* asked for should have been answered. (*Quære.*) Whether the statute of limitations is a good defense to a suit against the county on warrants until there is money in the treasury to pay them? Opinion by NAPTON, J.—*Logan v. Justices of the Co. Court.*

AMENDMENT ON APPEAL—CHANGE OF CAUSE OF ACTION—VERBAL PROOF OF WRITTEN CONTRACT.—On appeal from the probate court to the circuit court, the appellate court may properly allow any amendment that does not change the cause of action; and, where plaintiff bought land from defendant's intestate, on a contract to pay $250 per acre for 17 acres, and at that rate for all over 17 acres, and was to receive back, at the same rate, if there should be less than 17 acres, and on a survey it was found that there was 2 14-100 acres less than the 17 acres paid for, and the claim was expressed in the probate court to be for 2 14-100 acres at $250 per acre, an amendment made in the circuit court, which stated the claim to be for money overpaid on the purchase of the land, owing to the deficit of 2 14-100 acres, was not a change of the cause of action. On proof that the written contract had been deposited with a young, unmarried man, occupying the same office with defendant's intestate, and that the young man had died, and that it was not known where the contract was, the court properly admitted proof of its contents.—*Hunt v. Boulton's Adm.*

EJECTMENT—EQUITABLE DEFENSE—LIS PENDENS.—A died, seized of real estate, which was sold in partition, and upon such sale the deed was made to B for the premises. Other heirs of A brought suit to set aside the decree in the partition suit, and cancel the deed to B, on the ground of fraud, and a demurrer was filed to this petition, which demurrer was sustained in the court below and judgment rendered thereon for B and the other defendants, from which judgment appeal was taken to the supreme court, where the judgment was reversed and remanded, and, in due course of law, a decree was rendered setting aside the first decree of partition, and to cancel the deed made to B, and for partition, and under this decree the sheriff sold and conveyed to the defendant's grantor. After the judgment on demurrer had been reversed in the supreme court, and while the case was still pending in the court below, A executed a deed of trust upon the premises under which there was a sale, at which the plaintiff bought the land, or rather the title of B, and then instituted this suit in ejectment. *Held*, that plaintiffs acquired by purchase under the deed of trust only such title as B had, and that the effect of the pendency of this suit, altered by the fact that, upon the reversal of the judgment on demurrer, the mandate of the supreme court did not reach the lower court until several days after the execution of the deed of trust by B. O'Rielly v. Nicholson, 45 Mo. 160; Turner v. Babb, 60 Mo. 342. Nor is it any objection that the land-court not only set aside the decree and canceled the deed to B, but proceeded, without the appointment of commissioners, to ascertain the rights of the parties, and decree a sale and distribution of proceeds. For the land-court possessed equitable powers, and the doctrine is too well settled to be called in question, that when a court of equity once acquires jurisdiction of a cause, it will not relax its grasp until it shall have avoided a multiplicity of suits, by doing full and complete justice in the premises. Besides, the equity jurisdiction in partition cases is an *ancient one*, and is not curtailed nor ousted by the statute of partition, since the act contains no words in exclusion of equity jurisdiction. [Corby v. Bean, 44 Mo. 379; Rozier v. Griffith, 31 Mo. 171; Keeton v. Spradling, 13 Mo. 321; Primm *et al.* v. Raboteau, 56 Mo. 407; McDaniel v. Lee, 37 Mo. 204; 1 Story Eq. Jur., § 64, K. 71; Russell v. Clark, 7 Cranch, 69; Armstrong v. Gilchrist, 2 Johns., cas. 424; Lerdy v. Veeder, 2 Cain. Cas. in Err. 175; Smith v. Sutton, 24 Gratt. 191; 1 Story Eq. Jur. § 658 and cases cited; 1 Story Eq. Jur., § 646, and cas. cit.; 1 Story Eq. Jur., § 64, i, 80; Stewart v. Caldwell, 54 Mo. 536; Pratt v. Clark, 57 Mo. 189]. Opinion by SHERWOOD, C. J.—*Real Estate Savings Inst. v. Colloricus.*

ABSTRACT OF DECISIONS OF THE SUPREME COURT OF ILLINOIS.

January Term, 1877.

[Filed at Ottawa, Jan. 31, 1877].

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" PINCKNEY H. WALKER,
" ALFRED M. CRAIG,
" JOHN SCHOLFIELD,
" JOHN M. SCOTT,
" T. LYLE DICKEY,
} Associate Justices.

ATTACHMENT — JUDGMENTS ENTITLED TO SHARE IN DISTRIBUTION OF PROCEEDS OF PROPERTY ATTACHED—PROCESS, WHEN RETURNABLE.—1. The statute that all judgments in attachments against the same defendant returnable at the same term, etc., shall share *pro rata* in the proceeds of the property attached, either in the hands of a garnisher or otherwise, applies to a suit by attachment commenced within ten days of the same term to which the other writs are returnable. 2. Where ten days do not intervene between the commencement of a suit, whether by attachment or summons, and the first day of the next term of the court, the plaintiff has his election to have the process made returnable to the next term or to the succeeding term; but if it is made returnable to the first term, the cause will be continued. Opinion by SCOTT, J.—*Mechanics' Savings Institution v. Givens et al.*

MANDAMUS TO COMPEL COUNTY BOARD TO BUILD JAIL.—1. If a county board should fail and refuse to provide any kind of a jail in which to confine prisoners, and it is made clearly to appear that the finances of the county are such as to justify the construction of one, the duty enjoined on the board by statute may be enforced by *mandamus;* but the court can not interfere with the discretion vested in the board as to the kind of a jail to be provided. 2. The county board, under the statute, have the sole power to determine the size, cost and quality of the materials of which county jails shall be constructed. In this, and various other respects, they are invested with a discretion as to which the courts have no power to interfere. 3. When a board of supervisors have provided a county jail, the court, on an application for a *mandamus*, can not inquire into the fact whether it is suitable or in suitable repair; but this is a question for the board to decide. Opinion by CRAIG, J.—*People v. Supervisors of La Salle County.*

NEGLIGENCE OF A CITY IN PROVIDING HITCHING-POSTS—WHEN RECOVERY MAY BE HAD.—1. If there be any duty resting upon a city in regard to the sufficiency of hitching-posts it may provide, it is not bound to see that absolutely safe posts are set, and no more than ordinary care in the selection and setting of them is required. If they are such as would be reasonably sufficient, under all ordinary circumstances, for the purpose intended, the city will not be liable for injury caused by the breaking of one by a team fastened to it, and its running over a person. 2. When a horse with a cutter became frightened and ran away, and in passing where a team was hitched to a post, set by a city for a hitching-post, frightened the team and caused them to break the post and run, and they, after running some distance, ran over a person in the street and injured him, it was *held*, in an action by him against the city, that the injury was too remote and was not the proximate consequence of the defect in the post, and that the city was not liable. Opinion by SHELDON, C. J.—*City of Rockport v. Tripp.*

MARRIED WOMAN—POWER TO CONVEY MORTGAGE WITHOUT HUSBAND JOINING—LIEN IN EQUITY UPON HER SEPARATE ESTATE.—1. The laws relating to the conveyance of real-estate not being changed by the Married Woman's act of 1861, a mortgage given by a married woman

living separate from her husband, upon her real estate, to secure the payment of the purchase-money of other property bought by her, her husband not uniting therein, as a conveyance is void. 2. The execution of a mortgage by a married woman alone upon her separate property, may furnish a satisfactory ground upon which a court of equity may properly *establish* a lien upon it; but if this is done, the lien will have no retroactive operation, so as to affect prior rights acquired after the execution of the mortgage. The lien will operate upon the property in its condition at the date of the decree. 3. When a married woman, without her husband, executed a mortgage upon her real estate, and afterwards the same was sold under a proceeding to enforce a mechanics' lien for improvements thereon, it is error, on foreclosure of the mortgage, to declare it the prior lien. Opinion by DICKEY, J.—*Lewis v. Graves.*

PRACTICE — TRIAL WITHOUT SIMILITER — POSTPONEMENT—SECONDARY EVIDENCE. 1. The *similiter* to a negative plea can be added by the defendant, if he chooses, and there is no error in proceeding to trial without it. Going to trial without objection is a waiver of the right to insist upon its being added. 2. When a defendant is summoned, it is his duty to be present when his case is called for trial in its order, without further notice, and an affidavit for a postponement of the trial on account of his absence, which shows no just reason for his absence, and fails to show that there are any facts that can be proved by him, which can not be by other witnesses, is wholly insufficient. 3. When a postponement of a trial was asked until a certain hour, to procure the attendance of the defendants as witnesses in their own behalf, and refused, and the trial extended beyond the hour, and one of the defendants arrived after the hour and testified, it was *held* no error in refusing the request. 4. There is no error in refusing parol evidence of the contents of a letter when the preliminary proof does not clearly show it is either lost or destroyed, and not in the power of the party to produce it. 5. When a verdict is authorized by the evidence, and any other would be unwarranted, a judgment on it will not be disturbed for error in the instructions. Opinion by SCHOLFIELD, J.—*Lundy v. Pierson et. al.*

TROVER—RIGHT OF ACTION—LEASE—PROOF OF CONVERSION—MORTGAGE.—1. In trover it is essential that the plaintiff, at the time of the alleged conversion of the property, have not only the right of property in the chattel, but also the right to its immediate possession. 2. If at the time of an alleged conversion, by refusal to give possession, the property is leased to a third party, whose term has not expired, even the owner can not maintain trover, as he has no right to possession. 3. When the proof fails to show that the defendant ever had the actual possession of a chattel, or in any way prevented the plaintiff from using the same, but shows that, while it was leased by the plaintiff, the defendant purchased the same at a sale for taxes, and before the lease had expired, the defendant refused to part with his claim, this will not establish a conversion. 4. If the plaintiff in trover claims title to an undivided half of a mill under a chattel mortgage, and has never made any demand for one-half the property, or for common possession as owner of a half interest, but has demanded the whole before his mortgage became due, and when he had no right of possession, he can not recover. 5. While, as against the intervening rights of purchasers and incumbrancers, complete possession in an officer levying upon personal property for taxes is necessary before the sale, yet as to the party against whom the officer holds the warrant, or any one claiming under him by purchase before the levy or after the sale, possession in the officer is not essential to a valid sale by him. Opinion by DICKEY, J.—*Forth v. Persley.*

ASSESSMENT OF BENEFITS—WRIT OF ERROR TO COUNTY COURT — APPEAL — SPECIAL ASSESSMENTS — SEPARATE TRIALS — PROCEDURE.— 1. In 1874, there being no appeal authorized from the judgment of the county court to the circuit court from the assessment of benefits for public improvement by cities and towns, a writ of error lies from this court to review the same. 2. An appeal can only be prosecuted from an inferior to a superior court, pursuant to the provisions of some statute expressly conferring the right, and prescribing the terms and conditions upon which it shall be exercised. 3. Sec. 3 of the act to increase the jurisdiction of county courts, in force July 1, 1872, providing for appeals to the circuit court, has reference only to cases in which the county court is given jurisdiction by section 1. 4. Section 44 of the act of 1872, relating to towns and cities, declaring that the laws relating to the collection of taxes, etc., shall be applicable to proceedings to collect special assessments, has no application to a proceeding to condemn property. 5. In a proceeding by a city to levy special assessments upon property benefitted by a public improvement, it is proper to submit the several questions raised by the several objectors to the same jury. 6. The mode to be pursued in selecting a jury in a special assessment case against various lots, is similar to the practice in criminal cases, where several are jointly tried. In such case, each defendant has a right to an equal number of challenges, which he may, if he thinks proper, fully exhaust, as well as the benefit of the challenges of his co-defendant. 7. The plaintiff holding the affirmative in a proceeding to assess benefits, should first pass upon the jury; and this as often as new ones are called to fill the places of those excused, leaving the defendant an opportunity to object as often as new jurors are presented, until their right of peremptory challenge is exhausted. Opinion by SCHOLFIELD, J.—*Fitzpatrick et al. v. The City of Joliet.*

INSURANCE—CONSENT TO REMOVAL OF GOODS—WAIVER—ESTOPPEL—PRACTICE.—1. It is not indispensable to a recovery for a loss of goods insured, after their removal to a different place, that consent should be first obtained for the removal; a subsequent ratification of the act, with a full knowledge of all the facts, is equivalent to a precedent consent. 2. When the local agent of an insurance company is informed that goods insured have been removed long before any loss occurs, and the company does not elect to cancel the policy and give the assured an opportunity of again insuring, it will be liable for the loss. 3. It would be inequitable to permit an insurance company to maintain that its policy was not binding upon it, and still retain the balance of the unearned premium, when it had positive knowledge of that which it insists effected the forfeiture. 4. A policy of insurance does not become absolutely void on a breach of the implied warranty as to the location of the property embraced in it, as the company may waive any restriction made for its benefit; and when such waiver distinctly appears, the insurer will be estopped from insisting upon that which is inconsistent with what he has said and done and which affects the rights of others. 5. When an insurance company refuses to pay a loss, placing its refusal upon its non-liability in any event, it can not insist, in defense of an action, that the preliminary proof was insufficient. 6. Although a policy of insurance may contain a clause prohibiting a suit for a certain time after loss, yet if the company positively refuses to pay under any circumstances, claiming that it is not liable at any time or in any event, the assured may bring suit at once, as the refusal will render the limitation clause nugatory. 7. When a case is fairly submitted and justice done, the judgment will not be reversed for error in excluding evidence that would not have tended to change the result. Opinion of SCOTT, J.—*Williamsburg City Fire Ins. Co. v. Cary.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1876.

HON. JAMES L. WORDEN, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" SAMUEL E. PERKINS,
" GEORGE V. HOWK,
} Associate Justices.

ASSIGNMENT FOR BENEFIT OF CREDITORS—VOID UNTIL RECORDED.—The act of 1859 (1 R. S. 1876, 142) requires that such assignments shall be recorded within ten days after their execution, and shall convey no interest to the assignee until so recorded. Under this statute the assigned property may be legally taken on execution after the date of the assignment, but before the same is recorded. Judgment affirmed. Opinion by PERKINS, J.—*Forkner v. Shafer et al.*

CRIMINAL PRACTICE—EVIDENCE—INTENTION.—The defendant is a competent witness to testify as to the intention with which he committed the alleged criminal act, and the interest of the defendant goes only to his credibility and not to his competency. It is error to exclude the defendant from stating what his intention was in the commis-

sion of the alleged criminal act. Judgment reversed. Opinion by NIBLACK, J.—*White v. The State of Indiana.*

PROMISSORY NOTE—DESCRIPTION OF PERSONS.—A note in the usual form, "we promise," etc., and signed by the makers as "trustees of the First Universalist Church," does not purport to bind the church, but the parties who signed it. The signers did not promise for or on behalf of the church, but as individuals, for and on behalf of themselves. The description, as trustees, must be regarded merely as a description of their persons (citing 19 Ind. 44), and the makers were personally liable. Judgment affirmed. Opinion by WORDEN, C. J.—*Hayes et al. v. Crutcher.*

REPLEVIN BAIL—CONVEYANCE TO DEFRAUD CREDITORS—RIGHTS OF PARTIES.—A replevin bail is a surety merely, and is entitled to all the protection and immunity of other sureties. His property can not be levied on until the property of the principal, subject to levy and sale on execution, has been exhausted. A contract for the sale or conveyance of property to hinder or delay creditors is illegal as to creditors only; as between the parties, and as to all others than creditors, it is valid and can be enforced like any other contract. [Citing 34 Ind. 433, and 42 Id. 421]. Judgment reversed.—*Clark et al. v. Haverstick.*

TENANCY—FORFEITURE—DEMAND—WAIVER.—Forfeitures are not favored in law and must be strictly construed. To entitle a landlord to re-enter and possess the premises for non-payment of rent, under a lease containing a clause of forfeiture upon non-payment of rent, he must demand the specific amount of rent due, just before sunset of the day upon which it became due, and upon the premises leased, where no place of payment is mentioned. The acceptance of rent paid after it became due, is a waiver of his right to enter under the forfeiture. Judgment affirmed. Opinion by BIDDLE, J.—*Bacon v. The Western Furniture Company.*

LIBEL—CORPORATIONS—PLEADING.—It has always been the law in Indiana that a plaintiff, suing in a name importing that it is a corporation, need not expressly aver that it is such. In New York the same rule is applied where a party *is sued* by a name importing that it is a corporation, and there is no reason why this rule should not be recognized in this state. Where the complaint avers that the libel was printed and published, it is sufficient, both at common law and under the code, and it is not necessary that the complaint should aver in detail the manner and extent of publication. Judgment affirmed. Opinion by PERKINS, J.—*Indianapolis Sun Company v. Horrell.*

JUDGMENT—PAYMENT BY SHERIFF, NO EXTINGUISHMENT.—Where an execution comes into the hands of a sheriff, and he holds it without levy on the property of the judgment-debtor until after the return day, and then pays the amount of the judgment to the creditor himself, the judgment is not extinguished by such payment, but is still alive for the benefit of the sheriff. Such a payment by the officer is compulsory within the meaning of the statute, and entitles the officer to all the rights he would acquire, if the payment had been compelled by means of a judgment and execution against him. Judgment affirmed. Opinion by WORDEN, C. J.—*Burbank v. Slinkard.*

CRIMINAL PLEADING—INSUFFICIENT INDICTMENT.—Under the statute of Indiana the indictment must contain a statement of the facts constituting the offense in plain and concise language, and have substantially all the allegations of a good indictment at common law. An indictment charging the commission of a murder by the firing of a pistol loaded with powder and balls, without alleging that the pistol was fired at the murdered man, or that he was wounded by the balls, from which wounds he died, does not contain a plain and certain statement of the facts constituting the crime, and is insufficient. Judgment reversed. Opinion by PERKINS, J.—*Shepherd v. The State of Indiana.*

BASTARDY—ALLOWANCE FOR SUPPORT OF CHILD.—Where the mother of a bastard child, when it is 16 months old, gives it to an orphan asylum to be taken care of, and the asylum binds the child out until it shall attain the age of eighteen years, the party taking it to support, clothe, and maintain the child, a judgment requiring the putative father of the child to pay money to the party to whom the child is thus indentured, is clearly erroneous. Such party is entitled to nothing, because he is to receive the services of the child when they become of value as compensation for maintaining it during the period of helplessness. The mother is entitled to a just sum for the 16 months she supported the child, but has no right to call further upon the putative father to aid in its support. Judgment reversed in part. Opinion by PERKINS, J.—*Young v. The State ex rel. Converse.*

NOTES.

IN City of Chicago v. Hering, Adm., recently decided by the Supreme Court of Illinois, where it was sought to recover damages resulting to the next of kin from the drowning of a child less than four years old, in a ditch of water immediately in front of the residence of his parents, it was held that no negligence could be imputed to the parents for their failure to keep a constant watch upon the child, nor to the mother for failing to resuscitate him when discovered; and that the city was guilty of gross negligence in permitting the existence of a ditch filled to the depth of five feet with water, and without guards, in the midst of a populous district. A verdict for $800 in such a case was held not to be excessive. This decision is in harmony with most of the later authorities. See Isabel v. Han. & St. Joe R. Co., 2 Cent. L. J. 590, and note.

OBITUARY—HON. ETHER SHEPLEY, for twelve years a Justice of the Supreme Judicial Court of Maine, and, for seven years more, Chief Justice, died recently at his residence near Saco, in that state, from the effects of an accident received some time since. Mr. Shepley was born in Groton, Mass., November 2d, 1789, and had, therefore, at the time of his decease, passed the age of eighty-seven years. He received his elementary education at Groton Academy, from which he passed to Dartmouth College, where he graduated in 1811. Mr. Shepley began the study of the law in South Berwick, Me., and completed it in Massachusetts. On being admitted to the bar he established himself at Saco, where he soon entered upon an extended and lucrative practice. In 1819, when the question of separating Maine from Massachusetts was exciting deep interest, Mr. Shepley, whose opinions were well known, was chosen to the General Court, and facilitated the measure. He was also chosen the same year a member of the convention which framed the constitution of Maine. In 1821 he was appointed United States Attorney for the District of Maine, which office he held for twelve years, extending through the whole of one and parts of two other presidential administrations—clear proof of his efficiency and popularity as an officer. In 1833 he was elected to the Senate of the United States, as successor to the famous John Holmes. He gave a warm support to the administration of Gen. Jackson, making several speeches on the removal of the United States Bank deposits, and other measures of the day. His tastes, however, were those of a lawyer and a jurist rather than of a politician, so that when he was appointed, in 1836, to the bench of the Supreme Court of Maine, he cheerfully accepted the place. In 1848 he became Chief Justice, and so continued until his constitutional term expired in 1855. The last public office held by Judge Shepley was that of sole commissioner to revise the laws of Maine, which task he ably discharged. The deceased jurist was the father of Gen. Geo. F. Shepley, now Judge of the First Federal Circuit, and John R. Shepley, Esq., of the firm of Glover & Shepley, of this city.——Hon. ONIAS C. SKINNER, sometime a Judge of the Supreme Court of Illinois, died at his residence in Quincy on the 4th instant. Judge Skinner was born in Oneida county, New York, in 1815. In 1830 he came West, and was admitted to the bar in 1841, and commenced practice in Ohio. The following year he removed to Illinois. In 1849 he was elected a member of the legislature, and in 1851 to the position of a circuit judge. His legal attainments, his fitness for a higher place in the judiciary of the state, were recognized in 1855 by his elevation to the supreme bench of the state. As judge of the Supreme Court he was regarded by the bar as the equal of the best jurists of that day. About the year 1859 he resigned his position on the bench to return to his practice, and secured the appointment of Hon. Pinckney H. Walker, still on the bench, as his successor. The cause of resignation was the small salary of $1,200, then paid Supreme Judges. Since then he has been engaged in the practice of law at Quincy. He was recognized as one of the ablest lawyers in the state, and was extraordinarily successful. Before the jury he was always powerful, and rarely failed to carry his points. In 1870 he accepted the position of member of the convention that framed the present constitution of the state, in which body he held the important post of chairman of the judiciary committee.